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In the Supreme Court of the United States

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*

v.

ALEXANDRE MIRZAYANCE, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code provides in part that federal habeas corpus relief "shall not be granted" on a claim "adjudicated on the merits" in state court unless the adjudication resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court." In this case, following an evidentiary hearing in which the district court resolved all factual disputes against the state prisoner, the Ninth Circuit Court of Appeals granted habeas relief without analyzing the state court adjudication under § 2254(d)(1), and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. The questions presented are:

1. May a federal habeas corpus court grant relief by reviewing a state prisoner's claim de novo on the basis of a federal evidentiary hearing record, without considering whether the state court's adjudication of the claim had been reasonable?

2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous?"

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In the Supreme Court of the United States

No. 06-

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*

v.

ALEXANDRE MIRZAYANCE, *Respondent*

PETITION FOR WRIT OF CERTIORARI

Michael A. Knowles, Warden, California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinions of the federal court of appeals and the district court are unpublished. The opinion of the California Court of Appeal, and the California Supreme Court's summary denial of habeas corpus relief, are unpublished. Each is reproduced in the Appendix to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

2. Section 2254 of Title 28 of the United States Code provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The opinion of the court of appeals was filed on April 10, 2006. The court of appeals' denial of the Warden's petition for rehearing and suggestion for rehearing en banc was filed on June 7, 2006. Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. *The Crime*

Respondent Mirzayance fatally stabbed and shot his nineteen-year-old cousin, Melanie Ookhtens, in her family's home. Immediately after the homicide, Mirzayance gathered the knife and the spent shell casings, showered, disposed of his bloody clothes, and left a false alibi message on Ookhtens's answering machine. Hours later, at the urging of a friend, Mirzayance turned himself in to police. He explained that he killed Ookhtens because she had "pissed him off" and because he had smoked marijuana. However, a urine sample taken from Mirzayance four hours after the murder tested negative for marijuana.

2. *State Court Proceedings*

Mirzayance was charged with first-degree murder. He entered pleas of not guilty and not guilty by reason of insanity (NGI). Under California law, such pleas result in a bifurcated trial. In the first phase, the jury renders a verdict solely on the question of guilt. If the jury finds the defendant guilty, a second phase occurs in which the jury determines whether the defendant has proven, by a preponderance of the evidence, that he was not sane at the time of the offense. Cal. Pen. Code §

1026.

Mirzayance's trial counsel, Donald Wager, sought to obtain a guilt-phase verdict of only second-degree murder—a level of culpability that he conceded to the jury—and thereafter to secure an NGI verdict. The jury, however, returned a verdict of first-degree murder. After conferring with his co-counsel, Wager advised Mirzayance to withdraw the NGI plea. Mirzayance did so and was sentenced to prison for a statutorily-mandated term of twenty-nine years to life.

In state habeas corpus proceedings, Mirzayance claimed that Wager had rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), for advising him to withdraw the NGI plea. The California Court of Appeal and the California Supreme Court summarily denied Mirzayance's ineffective-assistance claim without explanation. Pet. App. F & H.

3. *Federal Habeas Corpus Proceedings*

a. Mirzayance raised the same ineffective-counsel claim in a federal habeas petition. The district court denied relief, concluding that the state-court decisions were "neither contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d)." As the district court explained:

> Given that the jury rejected Dr. Satz's [guilt-phase expert opinion] that [Mirzayance's] mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and accept the sentence of the court.
>
> * * *
>
> Accordingly, on this record, counsel's strategic

> decision to recommend the withdrawal of the insanity defense, made after consultation with [Mirzayance], was not an unreasonable one, and does not constitute ineffective assistance of counsel.

Pet. App. at 114-18.

b. Mirzayance appealed. Noting that "[t]he record presents conflicting reasons for the abandonment of the insanity defense," the United States Court of Appeals for the Ninth Circuit remanded the case to the district court "with instructions to conduct an evidentiary hearing on whether counsel was deficient for recommending and concurring in the withdrawal of the insanity defense [*Strickland* prong one], and if so, whether this ineffectiveness prejudiced Mirzayance [*Strickland* prong two]." Pet. App. 74, 82.

c. Following a four-day evidentiary hearing, the district court resolved all factual disputes against Mirzayance. The district court found that the jury's conclusion that the murder was "willful, premeditated, and deliberate" meant the defense's strategy—to obtain a conviction of only second-degree murder—had failed. The court also found that, although Wager had planned to proceed with a sanity phase anyway, he believed that "[a]ny remaining chance of securing an NGI verdict . . . now depended (in his view) on presenting some 'emotional impact' testimony *by Petitioner's parents*, which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase." Pet. App. 17, 25. But the court determined that just before the sanity phase was to begin, Mirzayance's parents—to Wager's surprise—made it clear that they would not testify and that their attorney suggested to Wager that he proceed without them. The district court further found that, although Wager was angry, he concluded that the parents' refusal to testify was a "done deal," and "one that any beseeching on his part could not undo." Pet. App. 43-47.

Wager then consulted with his co-counsel, who concurred that they should withdraw the NGI plea. Pet. App. 42-43. The district court found that Wager "carefully weighed his options before making his decision final," that he had "made a rational choice to forgo the insanity defense," and that his decision was

"carefully considered," "not rashly made," and "appeared to be reasonable to him and his co-counsel, in light of the guilt phase verdicts and the parents' statements to him on the way to court that morning." Pet. App. 40-43.

Crediting counsel's decision as competent, the district court opined that, under the deferential standard of review required by 28 U.S.C. § 2254(d) as amended in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the state courts' rejection of the claim did not result from an unreasonable application of *Strickland*. The court also stated that its opinion would be the same even under de novo review of the record as expanded in federal court. Pet. App. 65-66.

Despite its factual and legal conclusions, however, the district court ultimately granted the writ because, in its view, the Ninth Circuit's remand order had amounted to a "mandate" that "destined [Mirzayance] to relief." The court noted that the remand order had contained a parenthetical citation to the pre-AEDPA case of *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987), an ineffective-counsel case in which the Fifth Circuit had observed that it could see "no advantage" in a trial counsel's decision to bypass an insanity defense. Pet. App. 65-66. The district court inferred from the Ninth Circuit's citation that the "'nothing to lose' rule pronounced in *Profitt*" was the "law of the case." Thus, the district court explained, the function of the evidentiary hearing was simply to determine, de novo, "whether, in fact, Petitioner had nothing to lose." Because defense counsel Wager had acknowledged there was nothing that Mirzayance "*gained* by waiving the NGI trial," the district court said it was "bound" to find that counsel had "nothing to lose," and that his performance was therefore necessarily deficient under *Proffitt*. Pet. App. 66-68 (italics added). The district court did not assess whether Wager's "deficient" performance had been prejudicial under *Strickland*. Instead, it concluded that the Ninth Circuit, per the remand order, had already decided that Wager's remaining NGI defense was "viable and strong" and that there was a reasonable probability Mirzayance "would have obtained a better trial outcome had that defense been presented." Given the perceived mandate, the district court "reluctantly" granted relief. Pet. App. 11-13,

67-68.

d. The Warden appealed and argued, inter alia, that the state-court decision was reasonable and thus conclusive under 28 U.S.C. § 2254(d)(1). The Ninth Circuit affirmed. In an unpublished 2-to-1 opinion, the panel first explained that the district court had erred in inferring any mandate for relief from the remand order. The majority, however, did not implement the ruling denying relief that the district court stated it would have issued absent the perceived mandate. Nor did it analyze whether the state courts' adjudication of the claim had been contrary to or an objectively unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). Rather, the majority affirmed the granting of the writ, "albeit on different grounds."

The panel majority replaced the district court's "key" factual findings with its own opposite findings. The panel majority found (1) that Wager had acted "rashly," and (2) that the parents had not refused to testify. Pet. App. 5. The majority then concluded that "'reasonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." Pet. App. 6 (quoting *Strickland*, 466 U.S. at 687). The majority further concluded that, if Wager had proceeded with a sanity phase, "there is a reasonable probability—one 'sufficient to undermine the confidence in the outcome'—that the jury would have found Mirzayance insane." *Id.*

The dissent contended that the majority should have deferred to the district court's well-founded "explicit factual findings," and that the majority's opinion "suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the 'nothing to lose' standard set forth in *Profitt* v. *Waldron*, 831 F.2d 1245 (5th Cir. 1987)." Pet. App. 8-10.

The Warden filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel majority failed to analyze the state court's ruling under 28 U.S.C. § 2254(d)(1)

and wrongly substituted its own factual findings for those of the district court. The court of appeals declined to rehear the case en banc. Pet. App. 1.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT AGAIN IMPROPERLY IGNORED § 2254(D)(1) AND ALSO IGNORED WELL-ESTABLISHED PRINCIPLES LIMITING ITS REVIEW OF DISTRICT COURT FACT FINDINGS

1. Certiorari should be granted, first, because this case presents a recurring issue of fundamental legal significance that strikes at the very balance of state-federal power set by Congress in AEDPA. Here, Mirzayance raised his federal ineffective-assistance claim in habeas corpus petitions in the California Court of Appeal and California Supreme Court. The state courts' summary dismissals of the claim signaled, under well-established California practice, that the state courts had assumed Mirzayance's factual allegations to be true but nevertheless rejected his constitutional claim on its merits. In granting federal relief, however, the Ninth Circuit ignored—as it has done in past cases—the 28 U.S.C. § 2254(d)(1) inquiry into whether the state-courts' adjudication of the habeas corpus petitioner's claim was in any event reasonable and therefore conclusive. As this Court has stressed repeatedly in a string of reversals of Ninth Circuit decisions out of California, AEDPA mandates that federal habeas corpus relief is unavailable unless and until a federal court determines that the state court's adjudication of the prisoner's claim fails deferential review under § 2254(d)(1). *E.g.*, *Early* v. *Packer*, 537 U.S. 3, 11 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U.S. 19, 26-37 (2002) (*per curiam*); see, *e.g.*, *Rice* v. *Collins*, 126 S. Ct. 969, 971-76 (2006); *Brown* v. *Payton*, 544 U.S. 133, 140-46 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664-66 (2004); *Middleton* v. *McNeil*, 541 U.S. 433, 436 (2004); *Yarborough* v. *Gentry*, 540 U.S. 1, 5 (2003) (*per curiam*); *Lockyer* v. *Andrade*, 538 U.S. 63, 75-76 (2003).

A federal habeas court's refusal to accord deference has special legal significance in ineffective-counsel cases, such as

this one, where a "doubly deferential" standard of review is required under AEDPA. *Yarborough*, 540 U.S. at 4. As this Court has most recently explained to the Ninth Circuit, "[a] panel majority's attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Rice*, 126 S. Ct. at 971. Here, it was the Ninth Circuit's error in this regard that determined the outcome of the case. Under proper deferential review, the state courts' rejection of Mirzayance's *Strickland* claim passed muster under § 2254(d)(1). For, under the circumstances and as explained below, it is reasonable to conclude that trial counsel's performance was competent under prevailing professional norms, and it is reasonable to conclude that Mirzayance's NGI defense would not have succeeded.

2. Certiorari should also be granted because the Ninth Circuit opinion directly conflicts with fundamental principles of appellate review as set forth by the Federal Rules of Civil Procedure and by this Court. The Ninth Circuit disregarded the district court's key factual findings and credibility determinations, which were fatal to Mirzayance's claim, and proceeded to grant habeas relief based on its own, opposite factual findings. The panel majority, however, never intimated that the district court's findings were not plausible or were "clearly erroneous." See Fed. R. Civ. Pro. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Federal appellate courts may not ignore the settled standard of factual review in order to set aside a state court judgment.

A. The Ninth Circuit Improperly Ignored the Threshold and Dispositive 28 U.S.C. § 2254(d)(1) Question

In this case, the state courts adjudicated and rejected Mirzayance's federal constitutional claim on the merits. But rather than reviewing that adjudication under the deferential standards of 28 U.S.C. § 2254(d), the Ninth Circuit erroneously granted relief based on its own de novo review of the federal evidentiary hearing record. As it has been constrained to do on many similar occasions in the past, this Court should step in and rectify the Ninth Circuit's fundamental error.

1. In California, a petitioner seeking habeas corpus relief must make specific factual allegations that state a claim upon which relief can be granted. *In re Swain*, 209 P.2d 793, 796 (Cal. 1949); see *In re Robbins*, 959 P.2d 311, 341 n.1 (Cal. 1998) (Mosk, J., conc.). The state court reviews the factual allegations and, if a prima facie claim has been made, an order to show cause is issued. *In re Sassounian*, 887 P.2d 527, 534 (Cal. 1995); *People* v. *Romero*, 883 P.2d 388, 390-93 (Cal. 1994).

Here, the California Court of Appeal and the California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim on the merits, but without a statement of reasons. Pet. App. F & H. As the California Supreme Court has repeatedly explained, a summary rejection of a habeas corpus claim without a statement of reasons is based on the assumption that the facts alleged in support of the claim are true but nevertheless do not make out a prima facie case of a valid constitutional claim. *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979).

The California Supreme Court's decision rejecting Mirzayance's claim, therefore, was an adjudication on the merits. The Ninth Circuit has recognized that this is California's procedure. See *Griffey* v. *Lindsey*, 345 F.3d 1058, 1066, *vacated as moot* 349 F.3d 1157 (9th Cir. 2003); *Visciotti* v. *Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), *rev'd on other grounds*, 537 U.S. 19 (2002); *Harris* v. *Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc), *cert. denied*, 420 U.S. 973 (1975) (holding that a California Supreme Court's "postcard denial without opinion is . . . a decision on the merits of the petition"); *accord Bennett* v. *Mueller*, 364 F. Supp. 2d 1160, 1173 (C.D. Cal. 2005).

2. Federal habeas corpus relief therefore is precluded in this case unless the state courts' ruling—that Mirzayance's claim was meritless even if his factual allegations were assumed to be true—was "contrary to" this Court's precedents, or an objectively "unreasonable application" of them, under § 2254(d). The district court twice showed this § 2254 deference, correctly explaining in two decisions that

Mirzayance's claim failed as a matter of law under AEDPA.[1/] Pet. App. 65-66, 114-18. But the Ninth Circuit, without analyzing the state courts' adjudication pursuant to § 2254(d)(1), granted relief by reviewing Mirzayance's claim de novo on the basis of a federal evidentiary hearing record alone. The Ninth Circuit mentioned the AEDPA standard at the outset of its opinion but never referred to it again. The panel majority opinion is devoid of any discussion of the state courts' adjudications in light of AEDPA; and, certainly, it never asserts how the state courts' denial of relief was objectively unreasonable. Thus, as in *Rice* v. *Collins*, "[t]hough it recited the proper standard of review," the Ninth Circuit improperly ignored that standard, and then substituted its evaluation of the federal evidentiary hearing record for the state court's evaluation of the state court's record. *Rice*, 126 S. Ct. at 973.

By ignoring the threshold § 2254(d)(1) inquiry, the Ninth Circuit again misapplied "settled rules that limit its role and authority" in AEDPA cases. *Id.* By making no statement of a § 2254(d) conclusion, and no effort to explain how the state court adjudication was objectively unreasonable, the Ninth Circuit afforded even less deference than that found to be insufficient in *Woodford* v. *Visciotti*, in which the Ninth Circuit at least undertook a § 2254(d) analysis. 537 U.S. at 22-27.

This Court explained to the Ninth Circuit in *Woodford* precisely what the panel majority ignored here: that "[t]he federal habeas scheme leaves primary responsibility with the state courts for these [ineffective-assistance claim] judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable." *Id.* at 27. Whether a federal court would reach the same conclusion as the California Supreme Court is beside the point; the controlling question is whether the state court's contrary assessment was objectively unreasonable. *Id.* Thus, federal

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1. The district court, however, "reluctantly" granted relief because of a mistaken belief that the Ninth Circuit's remand order was a "mandate" that "destined [Mirzayance] to relief," and gave it "no alternative other than to grant the Petition." Pet. App. 11-13, 65-68.

habeas corpus relief is unavailable unless and until it is first determined that the state court's summary resolution fails deferential § 2254(d)(1) scrutiny.

3. In this case, application of AEDPA's deference standard would have led to the inescapable conclusion that the state courts' adjudications were conclusive because they were not "contrary to" or "unreasonable applications" of "clearly established Federal law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Under *Strickland*, to prevail on an ineffective assistance of counsel claim, a habeas petitioner must show both that, considering all the circumstances, his counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. These principles, as set forth in *Strickland*, are "clearly established Federal law" under AEDPA. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002).

a. On the "performance" prong of the ineffective-counsel test, however, the Ninth Circuit failed to accord counsel's tactical decision the requisite "double deference" under AEDPA and *Strickland*. *Yarborough* v. *Gentry*, 540 U.S. at 4. It did the opposite. As the dissenting opinion recognized, Pet. App. 9-10, the panel majority applied a completely different standard—one inquiring whether counsel had "nothing to lose"—in place of the "clearly established" *Strickland* standard. The panel majority held that Wager's decision to forgo a possible NGI verdict was deficient because it secured "only the loss of this sole potential advantage," and that "no actual tactical advantage was to be gained by counsel's advice." Thus, the panel majority concluded, "[r]easonably effective assistance" would mean putting on "the only defense available." Pet. App. 6.

A state-court adjudication of an ineffective-counsel claim may not be deemed "contrary to" *Strickland*, or an "unreasonable application" of it, for declining to adopt and apply the Ninth Circuit's novel "nothing to lose" rule. This Court has never announced such a rule itself. On the contrary, it has explained that attorneys are *not* obligated to advance all nonfrivolous claims, motions, defenses, arguments, et cetera, that might theoretically succeed and thus benefit their clients.

See *Jones* v. *Barnes*, 463 U.S. 745, 751-54 (1983) (appellate counsel has no constitutional duty to raise every nonfrivolous issue requested by a defendant); *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985); see also *Evans* v. *Meyer*, 742 F.2d 371, 374 (7th Cir. 1973) (lawyer need not advise client of "every defense or argument or tactic that while theoretically possible is hopeless as a practical matter"). As this Court has explained, even when there *is* a bona fide defense, "counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." *United States* v. *Cronic*, 466 U.S. 648, 656, n.19 (1984). Far from being "clearly established Federal law," a "nothing to lose" standard is unworkable under *Strickland*: it imposes an impermissible per se rule that, whenever a lawyer has multiple expert opinions finding insanity, he must *always* go forward with an insanity phase, regardless of his professional judgment as to its appropriateness or likelihood of success.

Because the Ninth Circuit's test for ineffective assistance was not "clearly established Federal law as determined by the Supreme Court" "at the time the state court render[ed] its decision" (*Andrade*, 538 U.S. at 71), application of § 2254(d)(1) precludes habeas relief on the ground that Wager should have advanced an NGI defense because it was the only defense available.

b. In any event, the state courts' rejection of Mirzayance's claim precluded federal habeas corpus relief under § 2254(d)(1) because the record before the state courts reasonably supports the conclusion that counsel's challenged decision was not "prejudicial" under the second prong of the *Strickland* standard. Mirzayance presented most, if not all, of his material factual allegations to both the California Court of Appeal and the California Supreme Court. Indeed, the direct testimony of the key witnesses at the federal evidentiary hearing consisted of the same declarations filed in state courts. As noted above, the California Supreme Court assumed those factual allegations were true, but concluded that Mirzayance's constitutional claim still failed as a matter of law. The state courts did not unreasonably apply *Strickland* in rejecting Mirzayance's claim for lack of prejudice.

Strickland places the burden on the petitioner to establish a "reasonable probability" of prejudice. *Strickland*, 466 U.S. at 694. In the context of Mirzayance's challenge to the withdrawal of an NGI plea, that appears to mean demonstrating a reasonable probability that the jury otherwise would have found him not guilty by reason of insanity. See, *e.g.*, *United States* v. *Cox*, 826 F.2d 1518, 1525-26 (6th Cir. 1987); *Profitt*, 831 F.2d at 1250-51; *Weekley* v. *Jones*, 76 F.3d 1459, 1462 (8th Cir. 1996); *Weeks* v. *Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994).

To prevail on an insanity claim under California law, the defendant must prove by a preponderance of the evidence that he was legally insane, meaning that—regardless of whether he suffered from a mental disease or disability—he either could not appreciate the nature and quality of his actions at the time he committed the crime or could not appreciate the wrongfulness of those actions. Cal. Penal Code § 25(b); *People* v. *Skinner*, 704 P.2d 752, 763-65 (Cal. 1985). Here, only the latter question was at issue, for no one has opined that Mirzayance failed to appreciate the nature and quality of his actions.

Even if it were assumed that Mirzayance's parents and experts would have testified as alleged in his state habeas petitions, it would not be "objectively unreasonable" under *Strickland* to conclude that Mirzayance had not established a "reasonable probability" that the jury would have found he could not appreciate the wrongfulness of his actions. The same jury had already concluded that he deliberated and premeditated Ookhtens's murder, despite extensive mental-health testimony by Dr. Satz as to Mirzayance's mental condition. As properly instructed, the jury thus determined that he killed after careful thought and weighing considerations for and against doing so. See CALJIC No. 8.20.

Although Mirzayance's experts were prepared to opine that he did not know killing Ookhtens was wrong because he was acting on the paranoid delusion that he needed to defend himself, their testimony met a serious obstacle in the form of the jury's own determination that Mirzayance was guilty of premeditated and deliberate murder. Moreover, such expert

opinions could not be reasonably reconciled with the facts of the crime. Mirzayance's pre- and post-murder actions were obviously goal-oriented, rather than irrational, and clearly showed he knew the murder was wrong. Those actions included: waiting until he was alone with Ookhtens in the house before he closed the curtains and commenced his attack; collecting the knife and spent shell casings immediately after the murder; showering, disposing of his bloody clothes in a trash can, and concocting a false alibi on a telephone answering machine. Accordingly, even if Wager's decision to forgo an affirmative NGI defense amounted to deficient performance, the state courts were not wrong—let alone "objectively unreasonable"—in rejecting Mirzayance's *Strickland* claim.

B. The Ninth Circuit Improperly Substituted Its Own Factual Findings for Those of the District Court

Certiorari also should be granted to correct the Ninth Circuit's departure from the rules governing appellate review of district-court factfinding. As the dissent correctly stated in the panel's divided opinion, "the district court found that the trial counsel had made a rational, carefully considered, and informed decision to forgo the insanity defense." Pet. App. 8-9. The district court also found that the parents' actions amounted to "an express refusal to testify." *Id.* at 9.

But, without even discussing whether the district court's findings were clearly erroneous, the panel majority concluded: "We disagree that counsel's decision was carefully weighed and not made rashly." Pet. App. 5. And, as for the parents' refusal to testify, the majority inexplicably stated that "the district court's finding that the parents *did not refuse*, but merely expressed reluctance to testify is correct." *Id.* (italics added). By making its own factual findings, and then granting habeas relief because of those findings, the Ninth Circuit failed to heed both AEDPA and established principles of appellate review as set forth by the Federal Rules of Civil procedure and by this Court.

A federal appellate court must assess a district court's factual findings under the "clearly erroneous" standard of review. Fed. R. Civ. Pro. 52(a); *Anderson*, 470 U.S. at 573. As long as the

trier of fact's account of the evidence "is *plausible* in light of the record viewed in its entirety," a circuit court of appeals may not reverse it "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573-74 (italics added). Moreover, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

Here, the district court's factual findings, which clearly support the correctness and the reasonableness of the state-court decision, are well-supported by the record, and the panel majority did not suggest otherwise. Indeed, in support of its conclusion that counsel's decision was rational, carefully considered, informed, and not rashly made, the district court explained: (1) that Wager had hired multiple mental health experts to testify at the sanity phase that Mirzayance had committed the killing without premeditation or deliberation; (2) that Wager had recognized his expert testimony had "significant weaknesses," and he "convincingly detailed ways in which [the experts] could have been impeached[] for overlooking or minimizing facts which showcased [Mirzayance's] clearly goal-directed behavior"; (3) that the experts were subject to other impeachment, including evidence that one of the experts had altered his notes in a highly-publicized criminal case; (4) that Wager's strategy at the sanity phase had been to appeal to the jurors' emotions, which required "the heartfelt participation of [Mirzayance's] parents as witnesses"; (5) that Mirzayance's parents refused to testify, which made Wager's sanity-phase strategy "impossible to attempt"; and (6) that, prior to making his recommendation, Wager conferred with his "experienced co-counsel, Lawrence Boyle," who concurred in Wager's proposal. Pet. App. 42-43.

As for the district court's second "key" finding—that the parents refused to testify—the district court dedicated an entire section of evidentiary analysis to the issue. Over the course of five pages, the district court detailed the extensive live testimony and record evidence upon which the court made its credibility determinations. Pet. App. 43-47.

Thus, it was improper for the panel majority to set aside the

district court's factual findings and to conclude instead that Wager's decision was "made rashly" and was not carefully weighed. It was equally improper for the panel majority to disregard the finding that the parents conduct amounted to a "an express refusal to testify" and to instead opine that Wager "did not know with any certainty that Mirzayance's parents would not testify . . . ." In making its own contrary findings, the Ninth Circuit ignored the settled rule that "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Anderson*, 470 U.S. at 573-74; *Zenith*, 395 U.S. at 123.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 1, 2006

Respectfully submitted,

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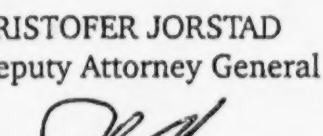

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APPENDIX A

FILED
JUN 07 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT Central District of California, Los Angeles ORDER

Before: HUG and WARDLAW, Circuit Judges, and SUKO,* District Judge.

A majority of the panel has voted to deny the petition for panel rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc, and Judge Hug recommended denying it. Judge Suko would grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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* The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

APPENDIX B

FILED
APR 10 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellee, v. MICHAEL A. KNOWLES, Warden, Respondent - Appellant.	No. 04-57102 D.C. No. CV-00-01388-DT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted November 18, 2005
Pasadena, California

Before: HUG and WARDLAW, Circuit Judges, and SUKO,**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Lonny R. Suko, United States District Judge for the Eastern District of Washington, sitting by designation.

District Judge.

The Warden appeals the district court's grant of Alexandre Mirzayance's petition for writ of habeas corpus based on ineffective assistance of counsel in his state trial court proceedings. We affirm.

I.

We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996) ("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can detennine whether a silent state court decision is objectively unreasonable."); *Greene v. Lambert*, 288 F.3d 1081, 1088-89 (9th Cir. 2002) (explaining AEDPA standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(l).

II.

The district court and the magistrate judge misapprehended our prior remand for an evidentiary hearing on whether counsel's advice to withdraw the plea of not guilty by reason of

insanity (NGI) was a true tactical decision that constituted "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The citation to *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987), indicated only that labeling a decision "tactical" does not necessarily mean that a true tactical choice, one "between alternatives that each have the potential for both benefit and loss," was made. *Id.* at 1249. The evidentiary hearing was necessary, as the state had not conducted one, to resolve the conflicting evidence as to counsel's reason for abandoning the insanity defense.

III.

Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. *Strickland*, 466 U.S. at 688. Counsel testified at the evidentiary hearing that he recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of Mirzayance's parents to testify in the insanity phase.

The Warden argues that counsel's decision was "strategic," and thus not deficient performance. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable" under *Strickland*. *Id.* at 690-91. We conclude, however, that counsel did not make a true tactical choice. Counsel failed to consider the likelihood that the jury, after hearing the substantial evidence available to show that Mirzayance was legally insane at the time of the killing, might be persuaded that Mirzayance was in fact insane. As lay people, they might not recognize, as counsel thought they would, the seeming logical incompatibility

between those two findings.[1] Moreover, counsel's fear that the jury would not find insanity after finding premeditation was unfounded, based on an unreasonable assumption that because the jury rejected the opinion of one mental health expert testifying on premeditation in the guilt phase, the jury would reject the testimony of four experts testifying on insanity in the NGI phase. Further, although counsel claims that Mirzayance's parents refused to testify, the district court's finding that the parents did not refuse, but merely expressed reluctance to testify is correct. Competent counsel would have attempted to persuade them to testify, which counsel here admits he did not.

We disagree that counsel's decision was carefully weighed and not made rashly. Counsel himself admitted in the evidentiary hearing that he was "not sure" whether "given [his] anger at the parents, [he] became so emotional that [he] lost [his] sense of advocacy." Counsel's belief that Mirzayance's interests would not be advanced by conducting the insanity phase was groundless. Counsel had planned to present substantial evidence, including a "cadre of experts," to testify that Mirzayance was legally insane at the time of the killing. He did not know with any certainty that Mirzayance's parents

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1. In fact, insanity and premeditation are not mutually exclusive. To establish insanity under California law, the defendant must prove "that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense." Cal. Penal Code § 25(b). Incapacity to know the nature and quality of one's act and to distinguish right from wrong is not incompatible with capacity to premeditate and deliberate, which does not necessarily require knowledge or understanding of the nature of the act premeditated or deliberated. Indeed, California law explicitly provides that premeditation and deliberation do not require a showing that "the defendant maturely and meaningfully reflected upon the gravity of his or her act." Cal. Penal Code § 189.

would not testify and that he would lose the sympathy that could be gained from their testimony. That possibility remained open.

In addition, his decision was made not on the basis of the facts before him, but on speculation. The sole advantage counsel could identify of withdrawing the insanity plea was based on his speculation that the judge was sympathetic to Mirzayance and would sentence him to a psychiatric prison, but would sentence more harshly if the jury found him sane. This is not only speculative, but also contrary to law. Under California law, withdrawal of the insanity plea amounted to a concession that Mirzayance was indeed sane. *See* Cal. Penal Code § 1016 (noting that absent a plea of not guilty by reason of insanity, a defendant is presumed to be sane).

Thus, even accepting counsel's emotional and speculative reasoning, his decision ultimately secured only the loss of this sole potential advantage. No actual tactical advantage was to be gained from counsel's advice; indeed, counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea. "Reasonably effective assistance" would put on the only defense available, especially in a case such as this where there was significant potential for success.

A "reasonable probability" exists that, but for counsel's recommendation that Mirzayance withdraw his insanity plea, "the result of the proceeding would have been different." *Strickland*, 446 U.S. at 694. If counsel had pursued the insanity phase of the trial, there is a reasonable probability—one "sufficient to undermine confidence in the outcome"—that the jury would have found Mirzayance insane. *Id.* As a result, Mirzayance would have been confined in a mental health facility rather than a prison, and confinement could be terminated when a sentencing court determined that his "sanity has been restored." Cal. Penal Code § 1026(a)-(b); *see also id.* § 190(a) (prescribing punishment for first-degree murder).

IV.

We affirm the district court's grant of habeas relief, albeit on different grounds.[2] The petition for writ of habeas corpus is granted if, within one hundred and twenty (120) days from the date the mandate issues, the state court does not grant Mirzayance the opportunity to reinstate his NGI plea and to conduct a sanity phase of trial as to that defense.

AFFIRMED.

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2. "We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." *Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004), *cert. denied*, 126 S. Ct. 484 (2005).

FILED
APR 10 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Mirzayance v. Knowles, 04-57102

SUKO, District Judge, concurring in part and dissenting in part:

I concur in the conclusion of Part II of the memorandum disposition finding the district court and the magistrate judge misapprehended our prior remand order. However, as to Parts III and IV, I respectfully dissent as I believe the majority has erred in concluding petitioner's counsel's decision to advise the petitioner to withdraw his NGI plea constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* mandates a highly deferential review of counsel's performance, viewed at the time of counsel's conduct. *Id.* at 689-90, 104 S.Ct. at 2065. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* In addition, findings of fact made by the district court are reviewed for clear error. *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001). This standard is significantly deferential because "findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations." *Rand v. Rowland*, 154 F.3d 952, 957 n. 4 (9th Cir. 1998) (en banc).

The purpose of the remand in this case was to permit the district court to resolve the "conflicting reasons for the abandonment of the insanity defense." E.R. 139. The factual questions involved in this inquiry were resolved by the district court against the petitioner. First, the district court found that the trial counsel had made a rational, carefully considered and

informed decision to forgo the insanity defense. Second, the district court found that the petitioner's parents strong disinclination to testify amounted to an express refusal to testify. Third, the district court found the attorney's decision to recommend withdrawal of the insanity defense was not affected by financial concerns. The district court also found defense counsel had correctly concluded that his experts' testimony had "significant weaknesses," noting that there were "convincingly detailed ways in which they could have been impeached, for overlooking or minimizing facts which showcased Petitioner's clearly goal directed behavior." [ER 179.]

These explicit factual findings of the district court were made following a four-day evidentiary hearing. Given the record before the district court and the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, I would find that counsel's performance was not unreasonable and thus not ineffective under *Strickland*.

I particularly disagree with the majority's legal and factual conclusion that "'[r]easonably effective assistance' would put on the only defense available, especially in a case such as this where there was significant potential for success." This conclusion suggests that to avoid violating *Strickland*, an attorney must always advance any potentially non-futile, colorable, affirmative defense regardless of its questionable merit or arguable chance of success. This is not the standard established by *Strickland* and in fact suggests something more akin to the "nothing to lose" standard set forth in *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987). Furthermore, while there would have existed *a* potential for success had Mirzayance proceeded with his insanity defense, nothing in the record suggests he had (or is able to demonstrate) a "*significant* potential" or even a reasonable probability of success. In fact, the record and findings of the district court suggest quite to the contrary. To summarize, his experts' testimony had significant weaknesses, there were at least two prosecution experts prepared to testify Mirzayance did not satisfy the legal test for

insanity, his parents were not going to testify, and the jury had just found him guilty beyond reasonable doubt of wilful, deliberate, and premeditated murder in the first degree, despite his concession to murder in the second degree. Additionally, as the magistrate judge correctly noted in his report and recommendation, under California law, during the insanity phase of the trial the *petitioner* would have bore the burden of proving by a preponderance of the evidence that he was insane at the time of the offense. Counsel's assessment of Mirzayance's insanity defense was neither unrealistic, nor unreasonable at the time. Finally, it is worth noting the district court decision which this panel is reviewing did not address the issue of prejudice under *Strickland*, having found the question immaterial given its conclusion petitioner could not have succeeded in proving counsel's deficient performance. [ER 200.]

Because Mirzayance has not established either counsel's constitutionally deficient performance or prejudice, I would reverse the district court's grant of habeas relief and remand with instructions to deny the habeas petition under *Strickland*. I therefore respectfully dissent from Parts III and IV of the disposition.

APPENDIX C

FILED
CLERK, U.S. DISTRICT COURT
NOV 10 2004
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
NOV 15 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE, Plaintiff(s), vs. MICHAEL KNOWLES, WARDEN, Defendant(s).	CASE NO. CV 00-1388 DT (RZ) ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Post-Remand Report and Recommendation of United States Magistrate Judge. Further, the Court has considered the objections of both Petitioner and Respondent, and has engaged in a de novo review of those portions of the Report to which the parties have objected. Having done so, the Court reluctantly accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions with additional comments provided herein.

This case was remanded by the Ninth Circuit, which ordered an evidentiary hearing on one specific claim of ineffective assistance of trial counsel. In that claim, Petitioner asserted that his trial counsel was ineffective because, after a jury found Petitioner guilty of first degree murder, his trial counsel advised him to withdraw his previous plea of not guilty by reason of insanity, and concurred in Petitioner's doing so.

The Ninth Circuit held that it was an abuse of discretion for the district court not to have conducted an evidentiary hearing. In short, the Ninth Circuit concluded that the record from the state court was not sufficient to determine the merits of Petitioner's claim. The sole purpose of the evidentiary hearing was to determine if Petitioner's trial counsel had a tactical reason for declining to proceed with the insanity defense. In its opinion, the Ninth Circuit noted that this decision to withdraw the insanity defense was made after the jury had already found Petitioner guilty of first degree murder, and further indicated that a tactical reason must have existed and must be one which offers some choice between alternatives which hold out the prospect for benefit.

After the evidentiary hearing, the magistrate judge concluded that the only way to implement the Ninth Circuit's mandate was to recommend a grant of the Petition as to that claim. The magistrate judge found that trial counsel had made a rational choice to forego the insanity defense; nevertheless, the evidence demonstrated that there was nothing for the Petitioner to lose in going forward with the insanity defense and it may have had some chance of success. As such, in light of the Ninth Circuit's decision in remanding the case, which established the law of the case, the magistrate judge and the district court were left with no alternative other than to grant the Petition. In essence, the Ninth Circuit held that, if Petitioner could not gain anything from foregoing a viable defense, then the decision to do so could not be strategic, and, therefore, demonstrated deficient performance.

This holding by the Ninth Circuit, therefore, established

the law of the case. Since the evidence introduced at the evidentiary hearing before the magistrate judge demonstrated that there were experts who could testify (even if subject to impeachment) and that Petitioner, having already been adjudged guilty of first degree murder, gave up nothing by going forward with the sanity phase of the trial. Under the Ninth Circuit's mandate, Petitioner was destined to relief.

DATED: NOV. 10, 2004

/S/
DICKRAN TEVRIZIAN
United States District Judge

FILED
CLERK, U.S. DISTRICT COURT
SEP -1 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE,	)
	) CASE NO.
Petitioner,	) CV 00-01388 DT (RZ)
	)
vs.	) POST-REMAND
	) REPORT AND
MICHAEL KNOWLES, Warden	) RECOMMENDATION
	) OF UNITED STATES
Respondent.	) MAGISTRATE JUDGE
	)

Pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California, the undersigned submits this Post-Remand Report and Recommendation to the Honorable Dickran Tevrizian, United States District Judge. The Court of Appeals has affirmed the prior ruling of this Court as to all claims except one claim of ineffective assistance of counsel. The appellate court remanded for this Court to hold an evidentiary hearing concerning counsel's advice that Petitioner withdraw his plea of not guilty by reason of insanity, instructing this Court to determine whether the decision to withdraw the plea represented a tactical choice or an abandonment of Petitioner's one viable defense. The undersigned concludes that, in order to implement the Ninth Circuit's mandate, the Court should grant the petition as to that single claim and issue a conditional writ of habeas corpus.

I.

BACKGROUND

A. The Murder[1/]

By all accounts, this case presents a tragedy. Petitioner Alexandre Mirzayance killed his cousin Melanie Ookhtens, then 19 years old, at her family's Los Angeles home on the evening of October 13, 1995. In tape-recorded statements to police shortly thereafter, Petitioner explained that Ookhtens was angry with him when she arrived home at around seven o'clock that evening because she found him there watching television at a time when they needed to go pick up her parents at the airport. Ookhtens then went upstairs to her bedroom. Some forty seconds later, Petitioner followed, knocked on her closed door, and asked what she was doing. She replied that she was getting dressed. Petitioner entered anyway.

Ookhtens immediately commanded Petitioner to get out. At this, Petitioner became angry, drew a hunting knife from his pocket and advanced towards her where she sat on her bed. She asked what he was doing with the knife. Petitioner stabbed her in the neck and abdomen. Ookhtens struck Petitioner and cried out for him to stop. He did stop stabbing her – and tossed his knife out through the bedroom door – but then drew a .25 caliber pistol from his pocket and shot Ookhtens four times, killing her. Forensic evidence ultimately demonstrated that Ookhtens suffered nine stab wounds, two of which were in the chest and would have proved mortal. Any one of her four gunshot wounds also would have been fatal. One gunshot

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1. A more detailed summary of the evidence of Petitioner's crime appears in pages 3 through 7 of the June 28, 2001 Report And Recommendation of Magistrate Judge Ann I. Jones. District Judge Dickran Tevrizian adopted that Report on July 12, 2001.

wound was in the abdomen; two were in her right temple, consistent with Petitioner's having shot her while he stood over her as she sat on her bed; and the fourth shot went into the top of Ookhtens' skull, consistent with Petitioner's having shot her while she was lying on the floor.

Petitioner gathered up the knife, some of the shell casings from the spent bullets, and some of his clothes that were at the Ookhtens residence, then returned to his own apartment in nearby Pasadena. He shed his bloody clothes, showered and deposited the stained clothes into a trash bag. At 8:07 p.m, he called the Ookhtens' home telephone and left the following message:

> Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say 'hi' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't how. Okay? So bye-bye.

After Petitioner left this message, at around 8:15 p.m, he called Laurent Meira – Petitioner's friend and the "Laurent" to whom he referred in his message – and agreed to go pick Meira up in his (Petitioner's) car. After they were in the car together, Petitioner told Meira that it was no good to be "high" and that he had "messed up real bad." He confessed to Meira that he had shot Ookhtens three times in the head and once in the stomach. Petitioner stopped his car at a Burger King, where he dumped the bag containing the bloody clothes into the restaurant's trash container.

After Petitioner drove away from the Burger King, Meira suggested that Petitioner go to a police station. Petitioner thought for a moment, then agreed and drove to the Pasadena

Police Station – after a brief stop at a convenience store to purchase a drink. At around 9:30 p.m, Petitioner told a Pasadena police sergeant that, about an hour after he had smoked a couple of hashish cigarettes, he had gotten into an argument with his cousin, shot her and killed her. After hearing and waiving his *Miranda* rights, Petitioner confessed in further detail, explaining, among other things, that he was angry at Ookhtens for hanging up on him the previous day. He later confessed to additional details, including his purchase of the .25 caliber handgun some five or six weeks earlier; the fact that he had been carrying the gun for the three days prior to the killing (but did not know why); and the fact that he had carried the knife on the day of the crime only. A urine sample provided by Petitioner after the crime tested negative for use of marijuana or hashish.

B. Procedural History

1. Trial

a. Guilt phase

In 1997, a Los Angeles County Superior Court jury convicted Petitioner of first degree murder. As discussed further below, the defense's principal goal during the guilt phase was Petitioner's conviction of only *second* degree murder, a degree of culpability that Petitioner's trial attorney, Donald Wager, chose to concede. Because Petitioner had pleaded Not Guilty By Reason Of Insanity ("NGI"), the sanity phase of the trial was scheduled to commence shortly after the jury's guilt-phase verdict; the jurors repeatedly had been advised that such a phase would occur if the guilt phase did not end in Petitioner's acquittal.

b. Abortive NGI phase

i. California procedure for NGI plea/defense

In California, a plea of not guilty by reason of insanity leads to a bifurcated trial. In the first phase, the fact-finder renders a verdict solely on the question of guilt. If the fact-finder returns a guilty verdict, then a second phase ensues in which the fact-finder determines whether the defendant carried his burden of proof, by a preponderance of the evidence, that he was not sane at he time of his offense. *See generally* CAL. PENAL CODE § 1026; 5 B. E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 669-676 (3d ed. 2000).

ii. Potential impact of NGI finding for Petitioner

The NGI phase effectively would decide which of two rather disparate confinements Petitioner received. Petitioner's conviction of first degree murder required a sentence of life in prison with no possibility of parole for at least 25 years – unless, in the sanity phase to come, the jury found that he was legally insane. In that event, Petitioner would not be imprisoned but rather would be confined in a mental health facility indefinitely, until a judicial proceeding in the sentencing court determined he had recovered his sanity. *Compare* CAL. PENAL CODE § 190 (three possible sentences for first-degree murder are death, life imprisonment without parole, and imprisonment for 25 years to life) *with* CAL. PENAL CODE § 1026 (defendant, if found legally insane, is to be confined indefinitely, until sentencing court determines his "sanity has been restored"); *see generally* 5 B. E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 669-693 (3d ed. 2000).

On the morning the sanity phase was set to begin, however, Wager advised Petitioner to withdraw the NGI plea, which Petitioner did.

c. Sentencing

After that withdrawal and a subsequent sentencing hearing, the trial court sentenced Petitioner to state prison for twenty-nine years to life – four years for a weapon-use enhancement that the jury found true, plus twenty-five years to life for the first degree murder count. Although Wager asked Petitioner's parents to testify during the sentencing hearing, they did not do so, explaining that to do so would have been "too emotional" for them. *See* Evidentiary Hearing Transcript ("EHT") Jan. 27, 2004 at 175-76.

2. Petitioner's challenges in the state courts

Petitioner exhausted numerous claims for relief in the California courts on direct review and in a series of habeas petitions. The state courts rejected all of his claims for relief. None of the various state-court orders and opinions denying relief provided an explanation for the denial of the specific claim involved in this Post-Remand Report.

3. Prior habeas proceedings in this Court

Petitioner filed a habeas corpus petition presenting his claims in this Court on February 9, 2000. In July 2001, the Court rejected all of Petitioner's claims for habeas relief and entered Judgment dismissing the action with prejudice. Petitioner appealed.

4. Ninth Circuit's partial reversal, remand and mandate

Although the Court of Appeals affirmed that Judgment as to most of Petitioner's claims, it concluded that this Court should have held an evidentiary hearing regarding one of them. *Mirzayance v. Hickman*, No. 01-56839, 2003 WL 21086225 at **2, **7 (9th Cir. May 9, 2003). In reversing and remanding, the Ninth Circuit explained its concerns that Wager's

performance may have been deficient:

> The district court dismissed [this claim] by citing to *Weber v. Israel*, 730 F.2d 499 (7th Cir. 1984). *Weber* involved the abandonment of an insanity defense, but there were tactical reasons for its abandonment. The counsel in *Weber* abandoned an insanity defense because the prosecution had two psychiatric experts stating that Weber was not suffering from a mental disease or defect at the the time of the alleged crimes, one of which referred to Weber as "malingering," and defense counsel had no psychiatric reports to the contrary. *Id.* at 505. Defense counsel thought that if the jury knew an insanity defense would follow, the jurors would not give the defendant as much deference on the merits. *Id.*
>
> In Mirzayance's case, the insanity defense was withdrawn *after* the guilt phase, and there was a cadre of experts [–] Dr. Markham [sic], Dr. Sharma, Dr. Vicary and Dr. Blum [–] prepared to testify that Mirzayance met the standard for legal insanity. *See Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987) ("[W]e cannot baptize the decision to forgo the insanity defense with the rejuvenating labels of 'tactical' or 'strategic' choice. Judges wisely defer to true tactical choices – that is to say, to choices between alternatives that each have the potential for benefit and loss . . . [but] we simply can see *no advantage* in the decision to bypass the insanity defense.") (emphasis in original); *see also United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) ("We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of

presenting.").

. . .

> A large number of experts were subpoenaed and ready to testify to Mirzayance's insanity. Mirzayance lacked knowledge of his own mental state. Defense counsel and those with whom defense counsel spoke gave conflicting statements about why defense counsel recommended the abandonment of the insanity defense on the morning it was scheduled to begin. Given these factors, the district court abused its discretion by not holding an evidentiary hearing on this . . . claim. An evidentiary hearing will assist in determining if there were tactical reasons for abandoning the insanity defense or if the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had.

Id. at **2-3 (emphasis in original). Accordingly, the Ninth Circuit remanded the case to this Court "with instructions to conduct an evidentiary hearing on whether [Petitioner's] counsel was deficient for recommending and concurring in the withdrawal of the insanity defense, and if so, whether this ineffectiveness prejudiced Mirzayance." *Id.* at **7.

II.

POST-REMAND PROCEEDINGS IN THIS COURT

After a September 15, 2003 status conference, the Court issued an order governing the briefing of and procedures for the evidentiary hearing, which the Court scheduled for January 27, 2004.

A. Petitioner's Discovery Motion

Late in October 2003, before the evidentiary hearing

occurred, Petitioner moved for authorization "to serve a subpoena on the Los Angeles Police Department to obtain the urine sample taken from petitioner on October 13, 1995 at the Pasadena Police Station." Petitioner argued two bases for granting his motion: (1) trial counsel's failure to insist on re-testing the sample could have constituted ineffective assistance of counsel, and, if so, then the Court reasonably could infer that counsel also was ineffective in deciding to abandon NGI; and (2) such discovery may be pertinent to cross-examination of Respondent's witnesses at the forthcoming evidentiary hearing. After a hearing on November 17, 2003, the Court denied Petitioner's discovery motion.

B. Evidentiary Hearing

The evidentiary hearing began as scheduled on January 27, 2004 and continued for three days of testimony and one day of argument. (Pursuant to stipulation, Petitioner presented most of his witnesses' direct testimony in writing.) The parties filed both pre- and post-hearing briefs, which the Court has considered in conjunction with the testimony and argument presented at the hearing.

1. Summary of evidence adduced

Although the parties do not dispute many of the events leading up to the decision by Petitioner's trial attorney Donald Wager to withdraw the NGI plea, they offer contradictory views and evidence about a few key matters, including (1) whether Petitioner's parents announced to Wager, on the morning the sanity phase of trial was scheduled to begin, that they would not take the stand as planned; and (2) how the sanity phase of the trial would have proceeded, had Wager not advised Petitioner to withdraw the NGI plea.

a. Before the first-degree-murder verdict

The defense's principal strategy and hope was to secure a guilt-phase verdict no worse than *second* degree murder – a level of guilt that Wager conceded, in his presentation to the jury – and thereafter to secure an NGI verdict. *See* EHT Jan. 27, 2004 at 31, 36, 43-44, 50 (Wager); 172-73, 181 (Petitioner's mother, Amalia Mirzayance), 181; EHT Jan. 28, 2004 at 105 (Petitioner's father, Samuel Mirzayance). The importance of securing such a verdict lay in California's definitions of the two degrees of murder and of legal insanity. Any killing of a human being "with malice aforethought" is murder, *see* CAL. PENAL CODE § 187, but a jury only may convict a defendant of *first* degree murder if its members agree that the killing was accomplished in one of several statutorily-specified ways, including any killing that is "willful, deliberate and premeditated[.]" *See* CAL. PENAL CODE § 189. Employing a standard state instruction, Petitioner's trial judge defined those terms for the jury as follows:

> The word "willful" . . . means intentional.
>
> The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.
>
> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and

> premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

CALJIC No. 8.20; *see* CT 244; RT 852-53. The defense suspected that a jury's finding, beyond a reasonable doubt, that Petitioner had "deliberated" and "premeditated" his killing of Ms. Ookhtens as a practical matter would cripple Petitioner's chances of convincing the jury later, during the sanity phase, that Petitioner nevertheless "was incapable of knowing or understanding the nature and quality of his . . . act and of distinguishing right from wrong at the time of the commission of the offense," CAL. PENAL CODE § 25(b), the legal test for insanity. *See* EHT Jan. 27, 2004 at 60, 88 (Wager "believed the return of a first degree verdict essentially legally meant there could be no support for an NGI finding by this jury.").

Wager called only one expert witness during the guilt phase, psychologist Paul Satz, Ph.D. (One of Wager's strategies was to save testimony of the rest of his mental health experts – for he had retained several others – for the sanity phase. *See* EHT Jan. 27, 2004 at 49.) Wager considered Dr. Satz's testimony "terrific on direct," when Dr. Satz gave testimony suggesting that Petitioner had not premeditated and deliberated the murder. *See* RT 462-63, 467, 502-03, 505. But Wager said Dr. Satz proved "an absolute disaster on cross[-examination],"

perhaps in reference to Satz's inability to explain the meaning of the terms "premeditation" and "deliberation" and his juror-annoying fidgeting with a retractable pointing device. *See* RT 520-21, 786-87; *see* Ex. 20 (Wager letter to Satz dated Aug. 4, 1997) ("Your testimony on cross examination was inadequate and showed lack of preparation"; "Your use of the expandable metal pointer by rapidly and repeatedly opening and closing it drew remarks from the jury after the verdict.").

b. The day of the first-degree guilt verdict

The jury dashed the defense's hopes by finding Petitioner guilty of first degree murder. Immediately after the announcement of that verdict on the morning of Thursday, June 26, 1997 (and the temporary removal of the jurors from the courtroom), Wager candidly told the trial judge, in reference to his hopes for the sanity phase, that "[o]bviously . . . this is not an uphill battle at this point[;] this is a perpendicular climb. Like mountain climbing. And I want to assess who we're going to call. I want to talk to the doctors in view of the [first degree murder] finding." RT 869; *see* RT 870 (specifying that what he wished to discuss with the doctors was "the first"). The trial judge agreed to a recess – a "cooling off period" – until the following morning, when the NGI phase was to begin. RT 869-70.

Before this Court, Wager stated that the jury's first-degree verdict affected him "very strongly" emotionally. EHT Jan. 27, 2004 at 98-99. Any remaining chance of securing an NGI verdict, Wager explained, now depended (in his view) on presenting some "emotional pact" testimony *by Petitioner's parents*, which Wager had viewed as key even if the defense *had* secured a second-degree murder verdict at the guilt phase. *See* EHT Jan. 27, 2004 at 100-02 (after disappointing guilt-phase verdict, Wager thought parents' testimony "was the linchpin to any chance of success" remaining for defense in NGI phase).

Later on the day of the guilt-phase verdict, Wager spoke to two of the several mental health experts who stood ready to testify that Petitioner was legally insane, psychologist Richard Romanoff, Ph.D., and psychiatrist Bennett Blum, M.D. Dr. Romanoff testified that he spoke with Wager for an hour; that at "no time did Mr. Wager raise the issue of waiving the insanity phase of the trial in his discussions with me"; and that, after the call, he prepared for an additional two hours for his NGI-phase testimony. Ex. 4 ¶ 10. Dr. Blum spoke with Wager around 6:30 on the evening of the guilty verdict, but the two men's testimony conflicts as to what Wager said about withdrawing the NGI plea. Dr. Blum testified that Wager told him he (Blum) "was not going to be needed for any testimony in the case[,] as he [Wager] was going to withdraw the insanity plea. He said that he did not think he could win the NGI case before the jury he had. Nothing was mentioned about the parents' testimony." Ex. 1 ¶ 9. Wager did not recall discussing with Blum a waiver of the NGI plea – although he allowed on cross-examination that he "might have done so in an academic manner[.]" EHT Jan. 27, 2004 at 102. But "assuming I discussed that with Dr. Blum," he cautioned, "it would [have been] the result of 'I wonder if we can have any chance at all and whether it should just be waived' – a musing kind of thing, I would think." *Id.*

Notwithstanding the two doctors' testimony suggesting otherwise, Petitioner does not dispute, in his post-hearing briefs, that Wager "had not made a final decision to withdraw the insanity defense at the time he picked up petitioner's parents [the following morning] to drive them to court." *See* Pet'r's Post-Hg. Br. at 2.

c. Friday morning

The parties present conflicting evidence about two conversations held while Wager and Petitioner's parents were en route to court on the next morning: one between Petitioner's

parents and Wager, and another, immediately thereafter, between all three of them and James Lund, a civil attorney who had represented Petitioner's father Samuel for over 30 years and become his friend during that time. *See* EHT Jan. 28, 2004 at 103.

i. Did Petitioner's parents refuse to testify?

Most sharply splitting the parties is the following factual issue: did Petitioner's parents, while traveling with Wager to court on Friday, June 27, 1997, announce their refusal or unwillingness to testify during the sanity phase?

(a) Wager's testimony

Wager says they did, in an announcement that shocked him then and still angers him today. *See* EHT Jan. 27, 2004 at 105. "I don't recall what conversation preceded their announcement," Wager explained at the evidentiary hearing, *id.* at 103, but

> shortly before we were at the [court] parking lot, within five minutes or so, I was talking to the Mirzayances about testifying. As I was on the way, Mr. Mirzayance says, "We're not going to testify."
> Q: [from Respondent's attorney] What was your reaction?
> A: Startled.
> Q: Did they give a reason?
> A: No.

EHT Jan. 27, 2004 at 58. Wager testified that he expressed disbelief, becoming "angry and emotional"; that he explained to Petitioner's parents that Petitioner had no chance of securing an NGI verdict without the "emotional quality from nonprofessional witnesses" that Mr. and Mrs. Mirzayance's testimony could provide; and "that they were abandoning their

son." The parents' response to Wager's statements, he testified, "was kind of flat, and I had no influence over them." *Id.* at 61, 103. "So that's when I asked, 'Let's call Lund,' and we did," Wager testified, referring to the Mirzayances' civil attorney, James Lund, who had helped to select Wager as Petitioner's attorney. *Id.* at 61. (The Court summarizes the evidence about the Lund phone call below.)

(b) Petitioner's parents' testimony

For their part, the Mirzayances deny that they ever refused, or stated their refusal, to testify for Petitioner, either on that morning or at any other time. But as Mrs. Mirzayance recounted in her declaration, which served as her direct testimony at the evidentiary hearing, Petitioner's parents *did* believe that Wager had failed to prepare them adequately for their key testimony – either before the guilt-phase verdict, *see* Ex. 12 ¶ 57, or afterwards:

> Even after the verdict of first degree murder came in, we were not talked to that afternoon by Mr. Wager in preparation for our testimony for the insanity trial. Instead, he picked us up at our hotel and took us to the court . . . . During that ride to court, Mr. Wager said he would be putting Sam and myself on the witness stand as the first witnesses. I commented to him that he had not prepared us for testimony as to what he would ask us on the witness stand. Mr. Wager then started saying that Alex [Petitioner] would not have a chance with this jury to win the insanity trial. 'We'll be humiliated,' he said and recommended that we give up the insanity trial. He said he would try to have Alex placed in a secure mental hospital. My husband and I said that Mr. Wager was the attorney and knew what was best to do.

> Sam [Mirzayance, Petitioner's father] suggested that Mr. Wager talk to James Lund. . . . Mr. Wager called him on a portable phone while in the parking lot of the courthouse. I was upset at what was happening. I could not hear what Mr. Lund said and do not recall what Mr. Wager told him. Both I and my husband talked to Jim Lund too on that same call. *At no time did I or my husband refuse to testify on behalf of our son at the trial.*

Ex. 12 ¶¶ 59-60 (emphasis added). When asked on cross-examination about whether she ever "expressed any reluctance to testify," Mrs. Mirzayance denied doing so – but volunteered an additional statement stressing that she felt unprepared to testify: "Never. Never. And he [Wager] always said he would prepare us." EHT Jan. 27, 2004 at 170.

Mr. Mirzayance's version of these events was nearly identical to his wife's. *See* EHT Jan. 28, 2004 at 104-05,107; Ex. 13 ¶¶ 54-55, 57. In addition, Mr. Mirzayance testified that Wager never appeared upset during the morning car ride to court, only "very reluctant," contrary to Wager's own testimony about his strong, negative emotional reaction. EHT Jan. 28, 2004 at 107.

At the sentencing hearing held shortly thereafter, Petitioner's parents did not testify; Petitioner's mother testified at the evidentiary hearing that such would have been "too emotional" for her. EHT Jan. 27, 2004 at 176.

ii. The phone call to James Lund

Although the parties do not dispute that a call was made to Lund from the car that morning, they give conflicting accounts about that call.

(a) Wager's testimony

Wager testified that Petitioner's parents spoke with Lund first, and after –

> I got on the phone, I said, "You know, Jim, you've got to convince them to testify. We had planned that they would testify[.]" . . .
>
> Q: [by Respondent's attorney] What was Lund's reaction to your comments?
>
> A: He said to me, "Can't you proceed without them?"
>
> Q: What was his demeanor?
>
> A: Calm.
>
> Q: What was his tone of voice like?
>
> A: Calm.
>
> . . .
>
> A: . . . I think in response to him, I said, "No, we can't. We discussed this. We went over this. We planned this. We need them as witnesses."

EHT Jan. 27, 2004 at 64. Wager provided additional details about this conversation on cross-examination:

> A: As I recall his words, it's just[,] you could put them on – you could put the defense on without them.
>
> Q: [by Petitioner's counsel] And you said what to that?
>
> A: . . . I was angry then because of my impressions I got from what he said and how he said it as to what I thought had been occurring. And I made a few comments to him, and he kept the same position.
>
> . . .
>
> Q: Did you say to him[,] why don't you use your best efforts right now and speak with Mr. and Mrs. Mirzayance and talk to them about

testifying on behalf of Alex?
A: No.

Id. at 105-06.

(b) Lund's testimony

Lund testified to a much different phone call, even disputing Wager's account that the Mirzayances, and not Wager himself, spoke with Lund first:

> [A]t about 8:15 a.m. . . . , I received a call at my home from Mr. Wager, who said he was in his car with Sam and Amalia. Mr. Wager told me that Sam and Amalia were in too much pain to testify; that he had spoken with [one of the defense's mental health experts,] Dr. Ronald Markman[,] who had assured Mr. Wager that he could arrange for Alexandre to be placed in a safe psychiatric prison treatment facility, such as Atascadero . . . ; and that, therefore, he (Mr. Wager) was going to withdraw the not guilty by reason of insanity plea and rely on the trial judge to instruct that Alexandre be sent to Atascadero or a similar institution at the time of sentencing.

Ex. 9 ¶ 23. Lund's declaration thus indicates that, by the time of the phone call, Wager *already had made* his decision to withdraw the NGI plea. On the witness stand, however, Lund changed this position somewhat, testifying that Wager indicated during the call that a decision to withdraw "was under very serious consideration by him." EHT Jan. 28, 2004 at 96.

In addition to the parents' "pain" and Dr. Markman's assurances, Lund testified, Wager said he based the NGI-withdrawal decision on his view that the trial judge was sympathetic to Petitioner and indeed would sentence him to a mental hospital rather than prison. *Id.* ¶ 24 "This prompted my

question to Mr. Wager as to what would be lost by going forward with the insanity defense, [given] all of the available expert testimony finding Alexandre legally insane. Mr. Wager responded that he wanted to avoid a finding that Alexandre was 'Sane' . . . [and] that he could not win an NGI finding before the jury he had." *Id.* ¶¶ 24-25. Lund testified that he thought it would be better to get Petitioner's experts' testimony on the record. *Id.* ¶ 25. Lund next spoke briefly with Petitioner's parents before the call ended. "Neither Sam nor Amalia ever told me that they refused to testify." *Id.* Lund jotted down a page of notes about the call a few minutes later. EHT Jan. 28, 2004 at 94; *see* Ex. 9 (internal exhibit D). Those notes largely are consistent with Lund's testimony.

Those notes also reflect, immediately above the portions relating to the phone call on the morning of June 27, 1997, that Lund had communicated with Petitioner's father on the preceding evening, the evening after the jury had returned its first degree murder verdict. At 8 p.m., according to Lund's notes, Lund called Petitioner's parents and left a message. At 10 p.m., again according to Lund's notes, Samuel Mirzayance returned the call, and the two men discussed the jury verdict. "Sam disconsolate," Lund's notes appear to state, although the last half of the second word is not entirely clear. *See id.* At the evidentiary hearing, Lund was not questioned about, and did not testify about, these two phone calls.

d. How the NGI phase would have proceeded

Based on the evidentiary hearing, the Court summarizes how three sets of NGI-phase witnesses' testimony could have proceeded: Petitioner's experts, the trial-court-appointed experts whom the prosecution planned to call and, perhaps, Petitioner's parents.

i. Petitioner's experts' testimony

Four psychiatrists and one psychologist were prepared to testify that Petitioner met the legal definition of insanity: Bennett Blum, M.D., Ronald Markman, M.D., Kaushal Sharma, M.D. and William Vicary, M.D., and Richard Romanoff, Ph.D. As noted below, all of them would have faced impeachment for, among other things, the fact that they *also* concluded that Petitioner had committed the killing without premeditation or deliberation (or without both) – a conclusion colliding head-on with the jury's guilt-phase finding that the evidence proved premeditation and deliberation beyond a reasonable doubt.

(a) Dr. Blum

A central portion of Dr. Blum's summary declaration, which makes reference to numerous reports, tests and other documents supporting his conclusion, is as follows:

> . . . [Petitioner] met the legal standard for insanity at the time of the offense because his paranoid mental disorder caused him to lack the ability to understand the wrongfulness of his conduct. His psychotic and paranoid perspective made him think he needed to defend himself against a non-existent imminent, life-threatening attack. . . .
>
> *For the same reasons stated in my report, I do not believe [Petitioner] committed the homicide acting with premeditation and deliberation.*

Ex. 1 ¶¶ 5-6 (emphasis added).

On cross-examination at the evidentiary hearing, Dr. Blum conceded that Petitioner had told "different stories to different doctors" about the history of his symptoms, such as reported hallucinations of spiders and cats, and his (Petitioner's) subjective perceptions at the time of the crime. The doctor also admitted that one of three or four possible reasons for these differences was that Petitioner was simply lying, *see* EHT Jan.

28, 2004 at 13-17, 24-27, and that another possible reason would be the interviewer's failure to inquire thoroughly. *See id.* at 44. Furthermore, Dr. Blum agreed that Petitioner had told him he had walked into his victim's bedroom while carrying a gun on his person and holding a knife in his hand, "with the intent of scaring her"; that such conduct does not indicate Petitioner was afraid of the victim at that time; and that Petitioner initiated the ensuing violence and ultimately "was firing at her head," with at least one shot fired while the victim was lying motionless on the floor. *Id.* at 21-22. In the immediate aftermath of the killing, Dr. Blum testified, Petitioner had not called the police and instead had taken several actions "consistent with goal-directed behavior, designed to avoid detection." Among these acts were his (1) retrieval of fallen bullet shell casings which could have tied Petitioner to the murder weapon; (2) returning home where he washed off and changed his clothes; (3) disposing, in a trash bin, of the bloodied clothes he had been wearing; and (4) recording a post-mortem, alibi-supporting message for the victim on her answering machine. *Id.* at 22-24. Dr. Blum admitted that "a reasonable inference [from such acts] is that someone who wants to avoid detection believes he's done something wrong." *Id.* at 24.

(b) Dr. Markman

Dr. Markman, who conducted a review of Petitioner's background similar to that undertaken by Dr. Blum, stated his opinion that Petitioner –

> suffered from a delusional disorder that was facilitated by his chronic use of cannabis. . . . I believed [Petitioner] met the legal standard for insanity at the time of the offense because his paranoid mental disorder caused him to lack the ability to understand the wrongfulness of his conduct.

> . . . [F]or the same reasons, *his ability to deliberate was defective*. . . .
>
> . . .
>
> . . . I am not aware of the reasons for [Wager's] not calling me to testify at the guilt phase on the lack of deliberation issue. *The facts prior to the homicidal outburst were inconsistent with a deliberated intent to kill.*

Ex. 2 ¶¶ 4, 7 (emphasis added). Dr. Markman also denied telling "any member of the defense team that, [were Petitioner to forgo] the insanity defense, I had the authority to effect [his] placement in a psychiatric facility." *Id.* ¶ 12.

On cross-examination, Dr. Markman acknowledged the tension between the jury's finding of deliberation, on the one hand, and, on the other hand, his opinion – formulated prior to that finding – that Petitioner lacked the ability to deliberate. *See* EHT Jan. 28, 2004 at 54. As in the cross-examination of Dr. Blum, the State's attorney queried Dr. Markman not only (1) about Petitioner's initiation of violence after entering the victim's bedroom, with a gun on hand and a knife in hand, but also (2) about Petitioner's numerous activities thereafter, such as collecting shell casings, disposing of bloody clothing, and recording a disingenuous alibi phone message, all of which Dr. Markman conceded "could certainly" be "goal-directed activit[ies] to avoid detection." *See id.* at 56-57.

The State's attorney called Dr. Markman's attention to the portion of the report prepared by one of the prosecution's mental health experts, Seawright Anderson, M.D., stating, "On direct query, when asked if he thought it was right or wrong to stab and shoot [the] victim, defendant admitted feeling that these actions were wrong at the time of present offense." *Id.* at 58; *see* Ex. 25-4 (Anderson report). Dr. Markman had not read Dr. Anderson's report when he prepared his own declaration but testified that, without a better understanding of the precise context in which Petitioner allegedly said this, he (Dr.

Markman) could not judge whether it would have changed his sanity opinion. EHT Jan. 28, 2004 at 57-60.

(c) Drs. Sharma, Vicary and Romanoff

Drs. Sharma, Vicary and Romanoff did not testify in person at the evidentiary hearing. Instead, the parties stipulated to admitting their declarations into evidence, with Respondent waiving cross-examination. *See* Pretrial Stip. (filed Jan. 20, 2004) ¶¶ 1-3; Exs. 4, 5 & 6. Like Drs. Blum and Markman, Wager had subpoenaed these three doctors to testify during the NGI phase of Petitioner' trial. Briefly stated, Dr. Sharma was prepared to testify that Petitioner –

> suffered from a combination of long-standing psychological problems, paranoid ideation, intellectual limitations and drug abuse.
>
> As a result of these mental deficits and disorders, I concluded that during the homicide *he did not act with premeditation and deliberation*[,] and that he would have met the standard for legal insanity at the time of the offense[,] because his ability to understand the wrongfulness of his conduct was substantially impaired by his mental illness.

Ex. 5 ¶¶ 4-5 (emphasis added).

Similarly, Dr. Vicary was prepared to give NGI-phase testimony that, in his opinion,

> Alex suffered from a chronic psychotic illness . . . [and] met the standard of legal insanity at the offense. I also stated that he was so grossly psychotic at the time of the offense that *it was unlikely that he formed the elevated homicidal intents of premeditation, deliberation or a malicious intent to kill.*

Ex. 6 ¶ 3 (emphasis added).

Finally, Dr. Romanoff's declaration reflects that he was prepared to testify *in the guilt phase* that Petitioner was psychotic at the time of the crime and, therefore, lacked the ability to deliberate; that the evidence of premeditation was lacking; and that "there may have been a basis for a jury finding of an absence of malice." Ex. 4 ¶¶ 8-9. Dr. Romanoff also prepared himself to give testimony at the sanity phase, but, had he been called to do so, he –

> would have preferred to provide only the psychological data and my diagnostic opinion as opposed to a legal opinion on the sanity standard in this case. I believe that this was not an easy case in which to make this legal assessment. However, if pressed, I could have provided strong evidence supportive of a theory that [Petitioner's] psychotic thought processes . . . resulted in a gross misperception of reality and a consequent potential lack of understanding of the wrongfulness of his conduct at the time of the homicide.

Id. ¶ 11.

ii. Prosecution expert's testimony

Two court-appointed psychiatrists were ready to testify that Petitioner, although mentally ill, was legally sane at the time of the killing: Seawright Anderson, M.D. and Sarabjit Sandhu, M.D. Both doctors had conducted investigations of Petitioner's mental state roughly comparable to those undertaken by the defense's experts.

(a) Dr. Anderson

Dr. Anderson diagnosed Petitioner as having "a

schizoaffective disorder of the bipolar type." EHT Jan. 29, 2004 at 9. As noted briefly above, however, Dr. Anderson reported putting a "direct query" to Petitioner as to whether he (Petitioner) had felt "it was right or wrong to stab or shoot [the] victim." According to Dr. Anderson, Petitioner responded that he felt "that these actions were wrong at the time of the present offense." *See id.* at 10-12; Ex. 25-4.

On cross-examination, Dr. Anderson admitted that, at the time of his interviews, Petitioner was taking certain medications ordinarily prescribed only to persons diagnosed as psychotic; that the statements attributed to Petitioner in the doctor's report largely were paraphrasings, not direct quotations (except where the report employed quotation marks); and that, during the second of two interviews with Dr. Anderson, Petitioner had indicated that he did not know why he killed the victim. *See id.* at 20-29. The doctor agreed with Dr. Satz's assessment that Petitioner "was probably psychotic," or at least "had psychotic episodes," for "most of his life," but he (Dr. Anderson) did not believe that Petitioner was psychotic "all the time [for] all of his life, no." *Id.* at 47. Dr. Anderson also agreed with Dr. Blum's core diagnosis of Petitioner as "schizophrenic or schizoaffective, a chronic psychotic illness." *Id.* at 48. Finally, Dr. Anderson agreed with Dr. Sharma's view that Petitioner was "impaired" at the time of the crime "due to long-standing psychological problems, paranoid ideations, intellectual limitations and drug abuse. . . ." *Id.* But Dr. Anderson differed with the defense's experts in assessing whether Petitioner's various clear impairments did, or did not, satisfy the legal test for insanity – a test which, Dr. Anderson explained, is not necessarily satisfied by every "psychotic." *Id.* at 50-52.

(b) Dr. Sandhu

The key portion of Dr. Sandhu's report states that Petitioner "was sane at the time of the commission of the instant offense. He understood the nature and quality of his act[,] and

he was clearly able to distinguish right from wrong. However, there are several factors that should be considered in mitigation," including his history of "emotional problems," limited intellectual abilities and regular use of marijuana and hashish. *See* Ex. 26-1. In his direct testimony, Dr. Sandhu emphasized his opinion that Petitioner did not "even [come] close to meeting the criteria for either" of the two prongs of the test for legal insanity. EHT Jan. 29, 2004 at 60-61. Dr. Sandhu explained that Petitioner failed the first part of the test, which requires an inability to know the nature and consequences of one's actions, because –

> [h]is actions were goal oriented. He was purposeful. He knew – he had a gun which he used. He had a knife. Just to make it more clear, there are defendants or individuals I have examined who carry around strange objects and given them strange connotations that are not reality based .... There was none of that here. He was quite cognizant of what he was doing in terms of his behavior, his actions, all throughout.

Id. at 61. Petitioner's conduct immediately after the killing, whereby he sought "to cover up his tracks" and establish an alibi, demonstrated to Dr. Sandhu that Petitioner understood that his actions were wrongful – and they thus weighed against him on the second prong of the insanity test, which requires an inability to know right from wrong. *Id.* at 65.

On cross-examination, Dr. Sandhu stated that "there was no premeditation and deliberation that [he] saw" in the homicide, and that, in that respect, he agreed with the similar conclusion of Dr. Sharma (albeit not with all of the reasons Dr. Sharma gave for his conclusion). *Id.* at 73. Like Dr. Anderson, Dr. Sandhu admitted that, when he was meeting with and evaluating Petitioner in custody, Petitioner had been medicated with drugs properly given only to persons diagnosed with a "psychosis" and "depression" *Id.* at 79-81. Dr. Sandhu

disagreed, however, with Dr. Satz's view that Petitioner "was probably psychotic most of his life" and with similar assessments by Drs. Markman, Sharma and Romanoff that Petitioner was "psychotic" at the time of the crime – although Dr. Sandhu opined that Petitioner may have *become* psychotic *after* the crime, inasmuch as "what he did would be the proverbial last straw" for his troubled mind. *Id.* at 97-98.

iii. Petitioner's parents' testimony

Assuming that, contrary to Wager's testimony, Petitioner's parents had not refused to testify during the sanity phase, they could have testified about Petitioner's mental health problems dating back to his early childhood. *See* Ex. 12 ¶¶ 9, 14-46; Ex. 13 ¶¶ 9, 11-39. Wager testified that, in the course of eliciting such background information, he had "wanted to bring out a strong emotion from both of them, hopefully tears," in contrast to the clinical testimony he anticipated from the defense's expert witnesses. *See* EHT Jan. 27, 2004 at 54, 140. Wager explained that he chose not to conduct formal, question-and-answer preparations for the parents' testimony, because he did not want the parents' "strong emotions [to] come out in the lawyer's office [instead of] the courtroom." *Id.* Suffice it to say that what Wager characterizes as his effort to preserve the freshness of the parents' hoped-for release of emotions, Petitioner instead characterizes as Wager's failure to prepare his parents properly for key anticipated areas of testimony.

2. Findings

Both parties' versions of the events immediately preceding Wager's decision to withdraw Petitioner's NGI plea have several weaknesses. The Court makes three key findings, as further discussed below: (1) that Wager did not act rashly, but instead made a decision that appeared reasonable to him and his co-counsel on June 27, 1997, in light of the guilt-phase verdict

and the parents' statements to him on the way to court that morning; (2) that neither party's witnesses stated the full truth about what was said during the parents' and Wager's trip to court on June 27, 1997, but that the evidence on balance favors Wager's position; and (3) that Wager's decision was not influenced, as Petitioner argued, by concerns that Petitioner's parents would pay him less than what he felt he was owed.

a. Wager's decision was carefully considered, not rashly made

The evidence supports Respondent's assertion that Wager carefully weighed his options before making his decision final; he did not make it rashly. Wager did not make up his mind until after the ride to court with Petitioner's parents on the morning of Friday, June 27, 1997. Although Dr. Blum was a credible witness and the Court has no reason to believe he sought to deceive, nevertheless his testimony – that Wager telephoned him the preceding evening and told him that Blum's testimony the following day would not be needed, because Wager was going to withdraw the NGI plea – is outweighed, collectively, by other credible evidence. Dr. Romanoff also received a call from Wager on June 26, 1997, and the two men spoke "for about an hour" with no mention by Wager of a withdrawal decision or that Dr. Romanoff's testimony would not be needed. It is unlikely that Wager would tell Dr. Blum of such a momentous decision while failing to make any mention of it at all in an hour-long talk with Dr. Romanoff the same afternoon. Furthermore, Wager arranged with Dr. Markman to come to court the next morning to testify. More plausible than Dr. Blum's statement, on this record, is what Wager himself suggested at the evidentiary hearing: that he may have been "musing" to Dr. Blum about a withdrawal, but that he did not announce an actual decision. Furthermore, even Petitioner, in his post-hearing brief, stated that Wager "had not made a final decision . . . at the time he picked up Petitioner's parents to

drive them to court." Pet'r's Post-Hg. Br. at 2.

Wager's strategy at the NGI phase had been to appeal to the jury in one or both of two ways that depended entirely on the heartfelt participation of Petitioner's parents as witnesses. First, he wanted to "humanize" Petitioner by having his parents discuss Petitioner's youth and prior mental-health symptoms, partly in the hope of bringing the parents to tears and thereby creating an emotional impact upon the jury. Second, Wager may have needed the parents to provide the only available direct, contemporaneous evidence of Petitioner's having had hallucinations in the past. (Perhaps Petitioner could have presented evidence of those hallucinations through several of his mental-health experts, although the evidence may not have been admissible. Such testimony, moreover, likely would not have had the heft of the parent's testimony, because the experts' reports about his hallucinations merely reflected what Petitioner and others had said after those events. Moreover, Wager knew that, although he had experts lined up to testify, their testimony had significant weaknesses. When pressed at the evidentiary hearing, he convincingly detailed ways in which they could have been impeached, for overlooking or minimizing facts which showcased Petitioner's clearly goal-directed behavior. EHT Jan. 27, 2004 at 138-40.

But Wager's NGI-phase strategy became impossible to attempt once Petitioner's parents, during their trip to court on the June 27, 1997, expressed – instead of their eagerness to testify on their son's behalf – their reluctance to do so, based on what they said was Wager's failure to prepare them adequately. (The Court's findings as to the parent's statements during that trip are discussed more fully in the section immediately below.) All Wager was left with were four experts, all of whom reached a conclusion – that Petitioner did not premeditate and deliberate his crime – that the same jury about to hear the NGI evidence already had rejected under a beyond-a-reasonable-doubt standard of proof. The experts were subject to other impeachment as well. One of them, Dr. Vicary, recently had

been involved in a well-publicized criminal case, in which he allegedly had altered his notes. EHT Jan. 28, 2004 at 89:3-7. Wager discussed the situation with his experienced co-counsel, Lawrence Boyle, who concurred in Wager's proposal that he recommend to Petitioner the withdrawal of the NGI plea. Among other things, Boyle believed that evidence of Petitioner's past hallucinations could come in only through Petitioner's parents. *See* EHT Jan. 27, 2004 at 66, Ex. 10-4.[2/]

b. Petitioner's parents may not have *expressly refused* to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing

Both parties present partially credible, partially compromised versions of the critical conversations between Wager, Petitioner's parents and James Lund during the trip to court on the morning of July 27, 1997. Petitioner's mother, father and Mr. Lund all used precisely the same terminology in stating that the parents never "refused" to testify on Petitioner's behalf. Such terminology appears to have been carefully crafted and synchronized for use in written declarations. While it therefore may be accurate in a precise, semantic sense to say that the parents never *refused* to testify, the Court finds that the parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as a refusal. Hence, when Respondent's attorney asked Amalia Mirzayance on cross-examination whether she ever expressed any such "reluctance" during the trip to court, Mrs. Mirzayance gave a two-part answer, the second part of which stands rather at odds with the first. "Never. Never," she began – but immediately added, unprompted and rather defensively, "And he [Wager] always said he would prepare us." The fact that Mrs. Mirzayance

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2. No objection was made to the admission of Boyle's statements as reflected in the exhibits.

added the second response when, and how, she did, suggests strongly that she indeed had expressed some resistence – based on a sense of unpreparedness – to testifying, and that, today, she still believes that she and Samuel Mirzayance were inadquately prepared for their NGI-phase testimony. In turn, Wager understood Mrs. Mirzayance's immediate reply, asserting her sense of unpreparedness and her resentment that Wager was at fault therefor, as an expression of her unwillingness to testify at all, for (according to her) Wager responded by recommending abandonment of the NGI defense as hopeless. (On the other hand, Wager testified that he does not remember what preceded the parents' refusal to testify – a refusal that he says Samuel, not Amalia, announced, and which was explicit – "We're not going to testify" – rather than implicitly couched in terms of unpreparedness.) In sum, both parties' witnesses appear to have shaded what the Court finds to be the truth about whether a "refusal" to testify occurred. Wager did so by testifying that Petitioner's parents announced an *express* refusal, and Petitioner's mother did so by failing to acknowledge that she effectively *had* refused by expressing strong reluctance based on Wager's alleged failure to prepare her and Samuel Mirzayance.

Corroborating the Court's finding that Petitioner's parents indicated a strong disinclination to testify at the NGI phase are the facts that (1) they did not testify later at his sentencing hearing, and (2) the reason for their choosing not to do so, according to Mrs. Mirzayance, is that they would not have been able to speak, or to speak well, because the occasion would have been "too emotional" for them. EHT Jan. 27, 2004 at 176. If weeks after the guilty verdict and the withdrawal of their son's NGI plea, Petitioner's parents' emotions still prevented them from testifying at the sentencing hearing, then surely those emotional obstacles to their testifying *in the NGI phase* would have been at least as potent, and probably more so. (If so, Wager made an accurate assessment about the capability of eliciting an emotional reaction, were they to testify.)

James Lund's testimony about the phone call that followed

the parents' effective refusal largely favors Petitioner's version of events, but the Court views it with some skepticism. As with the parents' testimony, Lund's account clashes so strongly with Wager's that it is difficult to conclude that the cause is merely a difference among the witnesses' memories and perceptions. In his declaration, Lund said that Wager began by telling him that the parents were "in too much pain to testify" and that, partly for that reason, he (Wager) was going to withdraw the NGI plea. Lund's notes, written shortly after the call, corroborate that statement. Assuming that this part of Lund's account is true, it is quite plausible that Lund would say *some* of what he testified he next said, such as asking Wager whether it would not be better to put on the defense without the parents' testimony.

But it is troubling that Lund did not *also* immediately say something to Wager more along the lines of, "What? What do you mean, they're 'in too much pain to testify'? This is Alex's life we're talking about here! Put them on the phone now, so that I can try to get them to testify." Instead, Lund apparently took Wager's news, which should have been shocking indeed, with aplomb – and thus neither asked the parents if Wager's "too much pain to testify" statement was true nor sought to persuade the parents to testify. (It is Petitioner's position today that the parents never refused, or expressed any reluctance, to testify at the NGI phase. Thus, if Lund instead *had* asked them about Wager's "too much pain" statement, presumably, in Petitioner's version of events, the parents would have answered such a question from Lund by saying something like, "No, we're in pain, Jim, but certainly not so much that we want not to testify. Where did Don get that idea?") Lund does say that neither parent "*told me that* they refused to testify," but then, Lund apparently did not *ask* them whether they refused. (Emphasis added.)

One possible explanation for why both Lund and Petitioner' parents appeared to be "on the same page" by the time of the cell-phone call that morning, and why Lund reacted

calmly to news that shocked Wager (and which Wager believed should have shocked Lund as well), is that Lund already had spoken with Samuel Mirzayance by telephone the preceding evening, several hours after the jury convicted Petitioner of first-degree murder. Lund's notes about his discussion with Samuel Mirzayance reflect that Lund himself called Samuel Mirzayance and, when Mr. Mirzayance returned his call, they discussed the guilt-phase verdict and that Samuel was "disconsolate." The notes provide no other record of what was said that night. This brevity contrasts remarkably with the extraordinary detail with which Lund otherwise approached not only his note-taking – as illustrated by the nineteen lines of notes he made about the short but critical cell-phone call the following morning – but also to his minute, task-by-task, contemporaneous "policing" of Wager's lawyering throughout the case. *See, e.g.*, Lund Decl. (Ex. 9) at internal exs. B (several documents, including detailed meeting agenda outlining anticipated procedural steps in the case, with Lund's handwritten notes and a legal memorandum on insanity defense appended; and "litigation work schedule" specifying, week by week, numerous tasks to be done in that week) and C (handwritten pre-meeting notes allegedly listing "the pre-trial tasks which Mr. Wager had assured would be accomplished prior to trial, but which reportedly had not been done"). Together with Lund, Petitioner's parents may well have decided on the night before the trip to court with Wager that they would tell Wager of their serious reluctance to testify on Petitioner's behalf.[3]

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3. Petitioner's parents repeatedly stated their view of Wager as singularly in charge of their son's defense, as "the captain" whose directives they followed even if they did not always fully understand or agree with him. *See* EHT Jan. 28, 2004 at 108 (Samuel Mirzyayance testimony). But the record suggests that James Lund was not far behind the scenes.

(continued...)

The Court finds Wager's account of the Lund phone call to be more credible, although it is not without weakness. Wager testified on direct that he expressly beseeched Lund, "Jim, you've got to convince them to testify," only to be told, calmly, "Can't you proceed without them?" But on cross-examination, Wager admitted that he had *not* asked Lund to use Lund's "best efforts right now" to get the parents to testify. The Court accepts this seeming inconsistency as Wager's conclusion that the parents' reluctance to testify was a "done deal," one that any beseeching on his part could not undo. *See* EHT Jan. 27, 2004 at 105-06 (Wager) ("I was angry then because of my impressions I got from what he said and how he said it as to what I thought had been occurring.").

c. Financial concerns did not affect Wager's decision

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3. (...continued)
Wager's co-counsel Larry Boyle apparently referred to him as "the client" and he oversaw numerous details in the case, including every action and perceived omission by Wager. *Compare* Eric Lund Decl. (Ex. 10) at its internal ex. A (memo to file and James Lund, recounting co-counsel Larry Boyle's statement that "*JLL* [James Lund] *wanted* there to be one captain and Wager was it," (emphasis added) *with id.* ¶ 5(a) (similar, but recounting that Boyle had said that "*the client*" wanted Wager to be the sole captain) (emphasis added); *see also* James Lund Decl. (Ex. 9) at internal exs. B (several documents, including detailed meeting agenda outlining anticipated procedural steps in the case, with Lund's handwritten notes and a legal memorandum on insanity defense appended; and "litigation work schedule" specifying, week by week, numerous tasks to be done in that week) and C (handwritten pre-meeting notes allegedly listing "the pre-trial tasks which Mr. Wager had assured would be accomplished prior to trial, but which reportedly had not been done").

Finally, the Court rejects Petitioner's implication that Wager advised Petitioner to withdraw the NGI defense because Wager believed that Petitioner's parents owed him additional funds. Wager testified that, as of the time of that decision, Petitioner's parents had not made any payments since May 1997, but their "pattern of payments" throughout the course of his representation had included such gaps in the past. Accordingly, Wager testified, "the fact that [Samuel Mirzayance] hadn't paid in May didn't really affect me [at the time of the NGI-withdrawal decision]. EHT Jan. 27, 2004 at 130-31. Indeed, it was not until after Petitioner's trial ended that Wager first learned he would not be receiving any further payments and, thus, considered suing Petitioner's parents for such payments. *Id.* at 131. No witness testified that anything about financial considerations was mentioned during the car ride to court on Friday morning. Petitioner's counsel candidly conceded at closing argument that he could point to no evidence showing that Wager believed *in late June 1997* that Petitioner's parents would not be paying him any more money. *See* EHT Jan. 30, 2004 at 21-23.

III.

STANDARD OF REVIEW

A fork lies in this Court's road to a decision on the claim currently before the Court. The split starts with the Court's selection of the proper standard of review to apply to the California courts' unexplicated denial of the claim.

A. Deferential Review Under AEDPA?

The first of two possibly applicable standards is the deferential standard dictated by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). 28 U.S.C. § 2254(d). This action was filed after the effective date of the

AEDPA. Under the AEDPA standard, federal courts "shall not" grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings[,] unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]"[4/] *Id.* Ineffective-assistance-of-counsel claims fall under the AEDPA rule. *See Yarborough v. Gentry*, 540 U.S. 1, ___, 124 S. Ct 1, 4 (2003) ("If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief" only if state courts' rejection fails either "contrary to" or objectively "unreasonable application" prong of AEDPA). Here, Petitioner presented his claim in state habeas petitions to the California Court of Appeal and California Supreme Court, and both courts denied the claim without explanation or citation, an act that constitutes an on-the-merits adjudication. *See Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); Exs. D (initial state-habeas petition and brief) at D314, D406 (internal ¶ III.F of both petition and brief), F & G (Court of Appeal opinion, and modification thereof, denying relief without explaining basis for rejection of claim now on remand), L (state supreme court habeas petition and brief) at L590-91, L655-67, L682 (internal ¶¶ III.D & III.F).

The usual AEDPA standard of review for claims thus "silently denied" is not *de novo*. Rather, the district court reviews the record independently to determine whether, in light

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4. A second prong of 28 U.S.C. § 2254(d) also permits habeas relief when the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Petitioner's theory on habeas, however, is not that the California courts' decision derived from inaccurate factual findings based on the record before them, but that the record was incomplete.

of that review, the state courts' rejection was "objectively unreasonable," as that phrase is used in *Williams v. Taylor*, 529 U.S. 362 (2000). *See Himes v. Thompson*, 336 F.3d 848, 853 n.3 (9th Cir. 2003) ("As we cannot attribute reason to a silent opinion, we have no source other than the record upon which to base our analysis."); *compare Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2002) (*following Williams* and requiring independent review of the record for federal habeas claims rejected without explanation in state court, but applying "clear error" test as whether state-court denial was "objectively unreasonable) *with Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The [Ninth Circuit's] gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.") (*citing Williams and Bell v. Cone*, 535 U.S. 685, 699 (2002)) (*repudiating in part Van Tran v. Lindsey*, 212 F.3d 1143, 1152-54 (9th Cir. 1999)).

Prior to the AEDPA, the lower federal courts could rely on their own decisions when granting habeas relief, even if those decisions went beyond the determinations of the Supreme Court itself. The AEDPA, however, expressly restricts federal habeas relief to claims in which the state-court adjudication violated "clearly established federal law, as determined by the Supreme Court" itself. As the high court explained in *Williams*, *supra*,

> [i]f this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar. In this respect, we agree with the Seventh Circuit that this clause "extends the [anti-retroactive relief] principle of *Teague* [*v. Lane*, 489 U.S. 288 (1989),] by limiting the source of doctrine on which a federal court may rely in addressing the application for a writ." *Lindh v. Murphy*, 96 F.3d 856, 869 (1996). As that court explained:

> This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty of this portion of § 2254(d)(1) is not the "contrary to" part but the reference to "Federal law, as *determined by the Supreme Court of the United States*" (emphasis added). . . . It does not, however, purport to limit the federal courts' independent interpretive authority with respect to federal questions.

Williams, 529 U.S. at 381-82 (analogizing AEDPA's concept of "clearly established Federal law" to the sort of well-settled Supreme Court doctrine discussed in *Teague v. Lane*, *supra*, 489 U.S. 288 (1989). *Williams*, 529 U.S. at 379-84. "In other words," the high court explained more recently in *Andrade*, *supra*, "'clearly established federal law' under § 2254(d)(l) is the governing legal principle or principles *set forth by the Supreme Court* at the time the state court renders its decision." 538 U.S. at 71 (emphasis added) (noting that "in most situations" determining such law will be "straightforward," but in some settings, such as the Eighth Amendment's limitations on lengthy prison sentences for recidivists, the Supreme Court's precedents will not present "a model of clarity"). "Thus," the Ninth Circuit recently explained, "[w]hile circuit law may be 'persuasive authority' for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts, and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (internal citations omitted).

Complicating any such deferential review of Petitioner's claim here is the fact that, after the state courts completed their denials of that claim, additional evidence has been adduced at an evidentiary hearing. The state courts' rulings derived from a record that did not include that evidence. How, then, may this Court assess whether the state courts' rejection of the claim constituted an "unreasonable application" of Supreme Court

authority? One possibility is to assess whether the State courts' *decision* constituted an objectively unreasonable application of high court doctrine in light of the record as augmented by this Court's evidentiary hearing.

B. Or, *De Novo* Review, Because Court Now Considers New Evidence?

Although, because the state courts decided Petitioner's claim on the merits, the text of the AEDPA appears to permit habeas relief on Petitioner's claim only if the state court's denial of relief constitutes an "objectively unreasonable" application of Supreme Court holdings, the Ninth Circuit and other Courts of Appeals have held, expressly or implicitly, that *de novo* review instead applies due to the addition of new evidence not considered by the state courts. *See Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ("AEDPA deference does not apply to Killian's perjury claim because the state courts could not have made a *proper* determination on the merits. Evidence of the perjury, after all, was adduced only at the hearing before the magistrate judge.") (emphasis added); *see also Monroe v. Angelone*, 323 F.3d 286, 297-98 (4th Cir. 2003) (rejecting AEDPA deference for claim grounded on evidence first admitted into the record during federal habeas proceedings) (*citing Killian* and other cases). Although it may make theoretical sense to dispense with deferential review for claims augmented, for the first time in federal district court, with factual support not considered by the state courts, nevertheless neither *Killian* nor *Monroe* addresses the tension between such an approach and the provisions of the AEDPA.

If *Killian* applies and requires *de novo* review, then this Court's analysis will differ from a deferential AEDPA analysis in two critical ways:

1. The Court must grant relief if Petitioner shows that the state-court rejection of his claim was wrong. Petitioner need not demonstrate that the state court's rejection of his

claim was not only wrong but went beyond "clear error" and resulted from an "objectively unreasonable" application of Supreme Court authority, and

2. As its substantive basis for deciding the claim, this Court must consider not only Supreme Court holdings (which are the only permissible referents under the AEDPA) but also decisions of the courts of appeals.

IV.

APPLICABLE SUBSTANTIVE LAW: *STRICKLAND* AND BEYOND

As noted immediately above, the breadth of substantive law bearing on Petitioner's claim depends directly on the chosen standard of review. If that standard is a deferential one under the AEDPA (albeit one requiring an independent review of the record, because the state courts' denial of the claim was unexplained), then the only proper basis for granting relief is a deviation from, or misapplication of, the decisional law of the Supreme Court. But if the AEDPA standard of review does not apply, then decisions by inferior courts also may be the basis for habeas relief, even if those decisions extend the holdings of the Supreme Court. In this section, the Court first summarizes the Supreme Court cases that appear to apply to Petitioner's ineffective assistance of counsel claim, then turns to Courts of Appeals decisions on the same subject.

A. Supreme Court Decisions: *Strickland*, *Gentry* and *Hill*

To establish a claim of ineffective assistance of counsel, Petitioner must demonstrate not only that his trial counsel's performance was deficient but also that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Williams v. Taylor*, 529 U.S. 362,

390 (2000). Petitioner bears the burden of establishing both components of the *Strickland* standard. *Strickland*, 466 U.S. at 687. As noted briefly above, habeas claims of ineffective assistance of counsel are subject to deferential review under the AEDPA. *Gentry*, *supra*, 540 U.S. 1, ___, 124 S. Ct. 1, 4 (2003).

1. Part 1 of *Strickland*: deficient attorney performance

Under *Strickland*, an attorney's performance is "deficient" if his or her errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *See* 466 U.S. at 687. A defendant is not entitled to perfect lawyering but only to "reasonably effective assistance." *Id.* In reviewing trial counsel's performance, the court will "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, fell outside the "wide range" of professionally competent assistance, will the petitioner meet this initial burden. *Strickland*, 466 U.S. at 690.

2. Part 2 of *Strickland*, and *Hill v. Lockhart*: resulting prejudice

An attorney's deficient performance still may not *harm* the defendant. Thus, satisfying the second, "prejudice" portion of *Strickland* requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams*, *supra*, 529 U.S. at 391. A "reasonable probability," the Supreme Court has explained, is one "sufficient to undermine confidence in the outcome." *Id.*

Petitioner seeks to compare his withdrawal of his NGI

plea, based on the allegedly deficient advice of Wager, to cases in which a defendant withdrew his *guilty* plea based on an attorney's deficient advice. The most prominent example is *Hill v. Lockhart*, 474 U.S. 52 (1985). *Hill* held, first, "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas." "[I]n order to satisfy the 'prejudice' requirement" of that test, the *Hill* Court explained,

> the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

474 U.S. at 59 (footnote omitted). *Hill* next explained that the proper method of ascertaining whether such a "reasonable probability" exists will vary greatly from case to case, depending on the particular manner in which the attorney allegedly failed the petitioner:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, when the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of the trial. [¶]
>
> Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the

> resolution of the "prejudice" inquiry will depend on whether the affirmative defense likely would have succeeded at trial. *See, e.g., Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984) ("It is inconceivable to us . . . that [the defendant] would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received"). As we explained in *Strickland v. Washington*, *supra*, these predictions of the outcome of a possible trial, where necessary, should be made objectively, without regard for the "idiosyncracies of the particular decisionmaker."

474 U.S. at 59-60.

Petitioner argues that *Hill* controls and "requires only a showing of reasonable probability that the defendant would not have . . . withdrawn his insanity plea[5/] but for the ineffective assistance." Pet'r's Reply Br. at 18. Petitioner cites no Supreme Court decision that has extended *Hill* which involved the withdrawal of a *guilty* plea, to the present *NGI*-plea-withdrawal setting, but he argues that the two situations nevertheless are "strong[ly] analog[ous]." "Just as there can be no conviction without a plea or guilt[y] verdict, there can be no resolution of a criminal case with an NGI plea outstanding." *Id.*

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5. In full, Petitioner states that he need only show a reasonable probability that he "would not have *pled guilty / withdraw his insanity plea* but for the ineffective assistance." Pet'r's Reply Br. at 18 (emphasis added). As discussed further below, the Court rejects Petitioner's attempt – via creative use of a slash ("/") – to equate, or conflate, (1) *the entering of a plea of guilty* based on poor legal advice, as occurred in *Hill*, with (2) *the withdrawal of a partial affirmative defense*, such as insanity, also based on poor legal advice.

Precisely how such a reading of *Hill* would impact this case is unclear, but Petitioner plainly believes it requires a finding of prejudice in this instance without regard for the evidence adduced about the weaknesses and strengths in the NGI phase as it would have occurred.

The Court disagrees that *Hill* eliminates any need to consider how the NGI phase would have proceeded (if, that is, the Court first concludes that Wager's performance was deficient). *Hill*'s holding concerned the withdrawal of a *guilty* plea based on poor lawyering. No Supreme Court or other authority reviewed by this Court has extended *Hill* to a withdrawal of an *insanity* plea. (Another Supreme Court case Petitioner cites, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), is similarly inapposite, for the petitioner's claim in that case – that his lawyer's ineptitude caused him to fail to file an appeal of his conviction – was that he had unfairly lost his chance to contest his guilt *per se*.) A California defendant's plea of NGI does not directly gainsay his alleged guilt, but rather invokes a partial affirmative defense. Unlike guilt, which the state must prove beyond reasonable doubt, insanity must be proven, by the defendant, by a preponderance of the evidence. *See* CAL. PENAL CODE § 25(b); *People v. Hernandez*, 22 Cal. 4th 512, 522, 93 Cal. Rptr. 2d 509, 515 (2000) ("Sanity proceedings do not constitute an *action*. Insanity is a plea raising an *affirmative defense* to a criminal charge, [albeit] one that does not negative an element of the offense.") (emphasis in original).

Once the NGI plea is properly viewed as invoking an affirmative defense, rather than as challenging the prosecution's case in chief, the specific teaching of *Hill* in this setting becomes clearer. Although it did not specifically mention insanity pleas, *Hill* did instruct lower courts that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend on whether the affirmative defense likely would have succeeded at trial." That language applies here, for Petitioner's position is that Wager's

deficient advice robbed him of his opportunity to present an affirmative defense, insanity. Accordingly, if the Court should conclude under the first *Strickland* test that Wager's conduct was deficient, its test for prejudice will be as follows: based on the evidence of how the NGI phase of Petitioner's trial *would have proceeded*, is there a reasonable probability that Petitioner would have obtained a verdict sustaining his NGI plea, had he not withdrawn that plea on Wager's advice?

B. Court of Appeals Decisions Applying, Or Perhaps Extending, *Strickland*

The Court next summarizes Court of Appeals decisions involving claims similar to Petitioner's (although the Court has reviewed no cases "on all fours" with Petitioner's claim).

1. Generally, counsel need not present every non-frivolous defense

A general rule framed by the Court of Appeals decisions is that an attorney does not perform deficiently under *Strickland* for failing to advance every possible defense when the attorney reasonably does not believe the client's interests would thereby be advanced. *See Iaea v. Sunn*, 800 F.2d 861, 865 n.4 (9th Cir. 1986) (*citing Tollet v. Henderson*, 411 U.S. 256, 267-68 (1973)); *Evans v. Meyer*, 742 F.2d 371, 374 (7th Cir. 1984) (lawyer need not advise client of "every defense or argument or tactic that while theoretically possible is hopeless as a practical matter"); *cf. United States v. Cronic*, 466 U.S. 648, 656-57 n.19 (1984) ("If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."). After all, "[t]here are countless ways to provide effective assistance of counsel in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 669. The law thus protects an attorney's informed

choices between two or more potentially beneficial courses of conduct. The fact that an attorney's forgone action *might* have helped the defense does not overcome the presumption of competence, if the attorney's course "might be considered a sound trial strategy," *id.* – that is, if it reasonably could have benefitted the defense in some way. *See Profitt v. Waldron*, 831 F.2d 1245, 1249 (5th Cir. 1987).

In an application of this rule that relates to the present petition, and one cited prominently by Respondent, the Ninth Circuit has held that –

> even where there is a strong basis for a mental defense, an attorney may forego that defense where the attorney's experts would be subject to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion. *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). . . .

Hendricks v. Calderon, 70 F.3d 1032, 1037 (9th Cir. 1995). But part of the reason why the choice to forgo a mental defense in both *Hendricks* and *Harris* was not deficient is that, in both cases, the petitioner's attorney had *other*, competing defenses or theories to advance and was reasonably concerned that a weak mental defense would detract from those other, preferred theories. As the Ninth Circuit explained in *Hendricks*:

> The choice to pursue a particular strategy in one phase [of trial] at the cost of lowering the likelihood of success in another phase is a tactical decision for which there is no correct answer, but only second guesses.

Id. at 1041. Thus, an attorney's informed decision to forgo a mental defense, particularly one lacking strong evidentiary support, in favor of other potentially beneficial defenses or theories, generally will not be "second-guessed" as deficient,

even if the gambit fails. *See Williams v. Woodford*, 306 F.3d 665, 709 (9th Cir. 2002) (counsel not deficient for declining to mount weakly-supported mental defense that would have conflicted with alibi theory); *Harris*, *supra*, 949 F.2d at 1525 (counsel not deficient for declining to mount mental defense that not only lacked strong expert support but also would have conflicted with defendant's alibi and mitigation strategies).

2. The "nothing to lose" concept

According to a few Court of Appeals cases, if an attorney chooses to do nothing and thereby forgoes a client's fully-prepared, non-frivolous *sole* defense – a defense with at least a reasonable chance of succeeding – without obtaining *any* chance of bettering his client's trial outcome, that attorney's action is "deficient" under the first prong of *Strickland*.

For example, in a key Fifth Circuit decision cited by the Ninth Circuit in its remand opinion, *Profitt*, *supra*, the petitioner's counsel at his Texas state-court trial was aware that his client recently had escaped from an Idaho asylum, but counsel failed to check readily-available public records showing that the petitioner also had been adjudicated legally insane by an Idaho court. Under Texas law, evidence of that Idaho adjudication would have shifted the burden of proof on the petitioner's insanity defense from the petitioner to the state, requiring the prosecution to prove sanity beyond a reasonable doubt. But because the petitioner's attorney failed to learn of the Idaho ruling and its significant potential benefit to his client, he forwent the insanity defense altogether, even though it was his client's only defense. The Fifth Circuit held that such a failure to investigate rendered counsel's performance inadequate – a conclusion bolstered by not only (1) the attorney's admission, at an evidentiary hearing, that he was not even aware that the Idaho judgment would have shifted his client's burden of proof in the Texas sanity defense, but also (2) the substantial prejudice that likely resulted from the neglect. (This latter point

illustrates a dynamic that the parties here do not expressly identify, namely that the outcome of the *first Strickland* prong, deficiency of performance, can relate strongly to the second, prejudice. In circumstances like those presented here, the greater the likelihood of prejudice flowing from an attorney's decision, the greater the likelihood that the attorney's decision also constituted deficient performance.)

The *Profitt* panel rejected the state's assertion that the petitioner's trial lawyer "made an informed and conscious decision on trial tactics in deciding not to pursue the insanity defense." Instead, the lawyer committed neglect that *deprived* the petitioner and the lawyer of any ability to make such a choice. In language quoted by the Ninth Circuit in the present case, *Profitt* explained that, instead of making "true tactical choices" that merit deference "– that is to say, . . . choices between alternatives that each have the potential for both benefit and loss" – Profitt's attorney had given up a potentially beneficial course in favor of a course that had no possibility of helping Profitt. Such a "nothing to gain" decision did not merit deference against "second guessing" and, the Fifth Circuit held, was deficient under the first part of *Strickland*.

The few other Courts of Appeals encountering this rare situation have agreed with *Profitt*. In *United States ex rel. Barnard v. Lane*, 819 F.2d 798 (7th Cir. 1987), the petitioner was convicted of first degree murder after his trial attorney declined – in an "all or nothing" gambit – to seek jury instructions for justification or manslaughter. Circuit Judge Harlington Wood wrote that it was not a proper tactical choice – one deserving deference under *Strickland* – for the attorney thus to seek jury nullification:

> Far from being a mere tactical choice, trial counsel's decision . . . , in the face of the jury's clear reluctance to find Barnard guilty of murder, was a prejudicial error which forced the jury to convict Barnard. . . . [G]iven Barnard's testimony and the

> instructions they were bound to follow, [the jury] could hardly do less than find Barnard guilty of murder. *The spectrum of counsel's legitimate tactical choices does not include abandoning a client's only defense* in the hope that a jury's sympathy will cause them to misapply or ignore the law they have sworn to follow .

Id. at 804-05 (emphasis added).

Finally, in *Epsom v. Hall*, 330 F.3d 49 (1st Cir. 2003), the petitioner asserted that his lawyer was ineffective for failing to call the *only* witness whose testimony could have supported an instruction on self-defense. "In his brief," the *Epsom* majority explained,

> [Epsom's] habeas counsel argued thus:
>
> > The basketball player with the ball, who decides that he can't pass because no one's really open, that he can't dribble because the defender knows he only goes right, and that he can't shoot because he's out of his best range, guarantees that his team will not score. The trial attorney here made the same outcome-determinative series of calculations.
>
> Often, a weak witness or argument is not merely useless but, worse than that, may detract from the strength of the case by distracting from stronger arguments and focusing attention on weaknesses. [Citations.] But we accept counsel's assertion on this appeal that weak witnesses in an otherwise hopeless case are better than none. For this reason, in such a case the failure to call weak witnesses cannot be justified merely by pointing to the potential weaknesses of each individual witness.

Id. at 53 (*dicta*). The First Circuit's acceptance of such a rule technically is *dictum*, for *Epsom* went on to decide not only that

Albert Epsom's case was *not* the sort of "otherwise-hopeless case" hypothesized in the rule, but also to reject habeas relief for that reason.

Respondent adverts to *Lowry v. Lewis*, 21 F.3d 344 (9th Cir. 1994), as support for the proposition that the Ninth Circuit has rejected the "nothing to lose concept." *Lowry* did so, but its holding on this point was interrelated with the context in which the ineffectiveness claim arose. Petitioner there asserted his counsel was ineffective for failing to make a suppression motion in a criminal case. In that context, the court of appeals noted that an attorney must guard his credibility and do his part to conserve judicial resources, and both may be jeopardized by the making of such a preliminary motion as to which it otherwise might be said that the attorney has nothing left to lose. *Id.*, 21 F.3d at 346. *Lowry* does not govern the present case, and the Ninth Circuit has not applied the "nothing to lose" concept to the context of a withdrawal of a NGI plea following a guilt phase determination.

V.

APPLICATION OF THE LAW OF THE CASE DOCTRINE (THE "MANDATE RULE") REQUIRES THE COURT TO SUSTAIN PETITIONER'S CLAIM

Under the law of the case doctrine and "the mandate rule," the Ninth Circuit's opinion remanding Petitioner's claim effectively decides for *this* Court which legal path it must choose at the above-described fork in the doctrinal road. That path leads to a grant of Petitioner's remanded claim.

A. The Law Of The Case Doctrine And The "Mandate Rule"

"The law of the case doctrine provides that 'the decision of an appellate court on a legal issue must be followed in all

subsequent proceedings in the same case.'" *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 849 (9th Cir. 2004) (quoting *Bernhardt v. Los Angeles County*, 339 F.3d 920, 924 (9th Cir. 2003) (citation omitted)). A prior ruling need not be expressly made, or discussed in any detail, to serve as the law of the case; decisions that are implicit, or terse, will suffice. *See id.* (matters "decided by necessary implication" included); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392-93 (9th Cir. 1995). A district court's failure to follow the law of the case, as established by a ruling of its supervising Court of Appeals, constitutes an abuse of discretion unless one of the following "three recognized exceptions" applies:

> (1) the earlier decision is clearly erroneous[,] [or] its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial.

Bronster, 363 F.3d at 349 (following *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996)); *see id* n.1 (noting, as to first listed exception, that the Ninth Circuit has sometimes required *either* "clear error" *or* "injustice," and at other times has required both elements). Here, neither of the first two exceptions applies. As to the third: new and "different evidence" certainly bas been adduced since the Ninth Circuit's remand, but the injection of that new evidence logically cannot support an exception to the law of the case doctrine as to previously-decided questions that are purely legal, such as the choice of a standard of review, rather than a mixed question of law and fact.

Related to the law of the case doctrine is the "mandate rule," whereby an inferior court must obey the mandate of its supervising appellate court. *See Insurance Group Comm. v. Denver & Rio Grande Western R.R. Co.*, 329 U.S. 607, 612 (1947) ("When matters are decided by an appellate court, its

rulings, unless reversed by it or by a superior court, bind the lower court."). Put differently, "district courts are not free to decide issues on remand that were previously decided either expressly or by necessary implication on appeal." *Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988) (*citing Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982), *and Stephens v. F/V Bonny Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984)). Lower courts' adherence to the mandate rule is absolutely "necessary to the operation of a hierarchical judicial system." *Id.*, *citing* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 4478 (1981).

B. The Law Of *This* Case, As Stated In Ninth Circuit's Mandate Opinion

Absent any constraints arising from the law of the case doctrine, this Court would face a difficult choice between two competing standards of review for Petitioner's claim, *i.e.*, between AEDPA review and *de novo* review. In turn, that choice directly controls the scope of applicable substantive law, *i.e.*, whether the state courts' rejection of the claim is to be tested only against *Supreme Court* decisions or whether authority from inferior federal courts also may serve as grounds for habeas relief. Were it writing on such a blank slate, this Court might conclude that –

(1) deferential review applies under the AEDPA, because the remanded claim "was adjudicated on the merits in State court proceedings," even though those proceedings did not include the current evidentiary record;

(2) Wager's considered decision to advise Petitioner to withdraw the NGI plea, under the circumstances discussed at length above, was not deficient so as to have deprived Petitioner of the counsel guaranteed by the Sixth Amendment, and hence did not constitute "deficient performance" under "clearly established

Federal law, as decided by the Supreme Court" in *Strickland* – a case which may not clearly hold, as some Courts of Appeals have foreshadowed, that a "nothing to lose" rule sometimes applies to ineffectiveness claims;

(3) thus, absent deficient performance, *Hill* and the prejudice prong of *Strickland* are immaterial;

(4) therefore, the California courts' unexplained rejection of Petitioner's claim did not result from an objectively unreasonable application of Supreme Court precedent, even if this Court supposes that the state courts were ruling on the current, expanded evidentiary record;

(5) alternatively, even if *de novo* review applied as indicated in *Killian v. Poole*, *supra*, 282 F.3d at 1208, Wager's decision still would not constitute ineffective assistance of counsel; and

(6) the petition should be denied as to the remanded claim.

But the Ninth Circuit's mandate clearly establishes law of the case that instead requires a more favorable result for Petitioner. The appellate panel quite clearly concluded that the proper test for assessing the ineffectiveness claim here was that stated by the Fifth Circuit in *Profitt v. Waldron*, *supra*, 831 F.2d at 1249:

> we cannot baptize the decision to forego the insanity defense with the rejuvenating labels of "tactical" or "strategic" choice. Judges wisely defer to true tactical choices – that is to say, to choices between alternatives that each have the potential for both benefit and loss . . . . [But] we simply can see *no advantage* in the decision to bypass the insanity defense.

Mirzayance, 2003 WL 21085225 at **2 (quoting *Profitt*, 831 F.2d at 1249 (emphasis in original)). After noting that "there was a cadre of experts ready to testify that Mirzayance was

insane," the Ninth Circuit concluded its discussion of the remanded claim as follows:

> An evidentiary hearing will assist in determining if [on the one hand] there were tactical reasons for abandoning the insanity defense or if [on the other hand] the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had.

Id. at **3.

The remand opinion mandates that the applicable *substantive* law by which this Court must judge the remanded claim is the "nothing to lose" rule pronounced in *Profitt*. The Ninth Circuit held that it was an abuse of discretion not to have held an evidentiary hearing, because such a hearing would determine whether, in fact, Petitioner had nothing to lose. If "nothing to lose" were not the applicable standard in the context of this case, then it would not have been an abuse of discretion to rely on the record before the State court. Thus, the function of the evidentiary hearing was to determine whether, in fact, Petitioner had nothing to lose.

Furthermore, implicit in the mandate, and required by *Killian*, *supra*, 282 F.3d at 1208, this Court must review the ineffectiveness claim *de novo*. If Petitioner had nothing to lose under *Profitt* – whether *Profitt* merely applies *Strickland*, or in fact extends it – the command of the Ninth Circuit is that *therefore* Petitioner is entitled to relief. And the Ninth Circuit's description of the NGI defense, as remaining "viable and strong," plainly indicates the appellate court's conclusion, under the prejudice prong of *Strickland*, that there is a "reasonable probability" that Petitioner would have obtained a better trial outcome had that defense been presented. Indeed, if in fact there is "nothing to lose" by presenting such a defense, prejudice is apparent so long as the NGI defense is not

frivolous.

Under *de novo* review, and tested against the substantive law of *Profitt* as the Ninth Circuit's mandate requires, Wager's decision could not have been a legitimate "tactical" one because it carried no prospect of aiding Petitioner substantially. Wager testified that, under the circumstances, he thought there was no reasonable chance of a successful NGI verdict, EHT Jan. 27, 2004 at 147-50, but he also admitted that there was nothing that "Alex gained by waiving the N.G.I. trial[.]" *Id.* at 123. Already facing a guilty verdict, Petitioner in fact had nothing to lose by proceeding with his already-prepared NGI defense. Bound by those matters inherent in the Ninth Circuit's decision, this Court must find that Petitioner had nothing to lose, and therefore that Wager's performance was deficient. As witnesses could have testified credibly and therefore perhaps successfully – even though subject to potential strong cross-examination – prejudice is established, as the Court's confidence in the verdict therefore is undermined.

VI.

RECOMMENDATION

Implementing the mandate of the Court of Appeals, therefore, the undersigned RECOMMENDS that the District Court issue an Order: (1) approving and accepting this Report; and (2) directing that Judgment be entered granting the petition for writ of habeas corpus as to the single remanded claim, *i.e.*, that Petitioner's trial attorney provided ineffective assistance of counsel in recommending, and concurring in, the withdrawal of Petitioner's plea, and defense, of Not Guilty By Reason Of Insanity ("NGI") *if*, within one hundred and twenty (120) days from the date the Judgment becomes final, or 120 days after appellate proceedings have concluded, the state court does not grant Petitioner the opportunity to reinstate his NGI plea, and to conduct a "sanity phase" of trial as to that defense.

DATED: September 1, 2004

/S/

RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

FILED
MAY 09 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEXANDRE MIRZAYANCE, Petitioner - Appellant, v. RODNEY HICKMAN, Warden, Mule Creek State Prison, Respondent - Appellee.	No. 01-56839 D.C. No. CV-00-01388-DT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted April 7, 2003
Pasadena, California

Before: BEEZER, FERNANDEZ, and PAEZ, Circuit Judges.

Alexandre Mirzayance appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. We affirm in part, reverse in part, and remand with instructions to

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

hold an evidentiary hearing on the ineffective assistance of counsel claim for abandonment of the not guilty by reason of insanity ("insanity") defense.

Our review is de novo. Wade v. Terhune, 202 F.3d 1190, 1194 (9th Cir. 2000). The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, applies because the petition for a writ of habeas corpus was filed on February 9, 2000. See Patterson v. Stewart, 251 F.3d 1243, 1245 (9th Cir. 2001) (noting that AEDPA applies to petitions filed after April 24, 1996). Under AEDPA:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A habeas petitioner alleging ineffective assistance of counsel under § 2254(d)'s "unreasonable application" clause must show that "the state court applied Strickland to the facts of his case in an objectively unreasonable manner." Woodford v. Visciotti, 123 S. Ct. 357, 360 (2002) (citing Strickland v. Washington, 466 U.S. 668 (1984)). Strickland holds that counsel is ineffective if counsel's "acts or omissions were outside the wide range of professionally competent assistance" and there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 690, 694.

Mirzayance argues that the district court abused its discretion in not granting an evidentiary hearing on:

1) the ineffective assistance of counsel claim for abandonment of the insanity defense; and
2) the spectator misconduct claim.

Mirzayance additionally argues that counsel was ineffective for:

3) calling only one expert witness at the guilt stage to testify regarding Mirzayance's mental health;
4) failing to prepare the expert witness to testify regarding premeditation and deliberation;
5) failing to adequately investigate and introduce facts pertaining to Mirzayance's mental health, relationship with the victim, and substance abuse;
6) conceding Mirzayance's guilt of second degree murder;
7) failing to request jury instruction CALJIC 4.21;
8) failing to request jury instruction CALJIC 8.73; and
9) advising petitioner to abandon his insanity defense and concurring in the withdrawal of that defense.

I

Mirzayance argues that the district court abused its discretion in deciding the ineffective assistance of counsel claim for abandonment of the insanity defense without an evidentiary hearing. We agree. "A state habeas petitioner is entitled to an evidentiary hearing on a claim if he did not receive a full and fair evidentiary hearing in state court and if he alleges facts that, if proven, would entitle him to relief." Tapia v. Roe, 189 F.3d 1052, 1056 (9th Cir. 1999).[1/] A district court's decision to deny

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1. There is no indication that Mirzayance was not diligent in trying to develop the factual basis of his claim in state court. Mirzayance stated in his federal habeas petition that he requested evidentiary hearings in state court, but that they

an evidentiary hearing is reviewed for abuse of discretion. Id.

Mirzayance did not receive an evidentiary hearing in state court and he alleges facts that, if proven, would entitle him to relief. The district court dismissed the ineffective assistance of counsel claim for abandonment of the insanity defense by citing to Weber v. Israel, 730 F.2d 499 (7th Cir. 1984). Weber involved the abandonment of an insanity defense, but there were tactical reasons for its abandonment. The counsel in Weber abandoned an insanity defense because the prosecution had two psychiatric reports stating that Weber was not suffering from a mental disease or defect at the time of the alleged crimes, one of which referred to Weber as "malingering," and defense counsel had no psychiatric reports to the contrary. Id. at 506-07. The decision to abandon the insanity defense in Weber also took place prior to the guilt phase. Id. at 505. Defense counsel thought that if the jury knew an insanity phase would follow, the jurors would not give the defendant as much deference on the merits. Id.

In Mirzayance's case, the insanity defense was withdrawn after the guilt phase and there was a cadre of experts ready to testify that Mirzayance was insane. Dr. Markham, Dr. Sharma, Dr. Vicary, and Dr. Blum were all prepared to testify that Mirzayance met the standard for legal insanity. See Profitt v. Waldron, 831 F.2d 1245, 1249 (5th Cir. 1987) ("[W]e cannot baptize the decision to forego the insanity defense with the rejuvenating labels of 'tactical' or 'strategic' choice. Judges wisely defer to true tactical choices – that is to say, to choices between alternatives that each have the potential for both benefit and loss. . . . we simply can see no advantage in the decision to bypass the insanity defense.") (emphasis in original); see also

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were denied. See Williams v. Taylor, 529 U.S. 420, 432 (2000) ("Under the opening clause of [28 U.S.C.] § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.").

United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996) ("We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense that he specifically stated he had every intention of presenting.").

The record presents conflicting reasons for the abandonment of the insanity defense. Defense counsel states that he decided to waive the insanity phase of the trial when Mirzayance's parents said they would not testify. Mirzayance's parents state that at no time did they refuse to testify. Mirzayance's parents assert that defense counsel unilaterally decided that he could not win the insanity phase of the trial and recommended that it not go forward on the morning that the insanity trial was scheduled to begin.

Bennett Blum, one of the insanity experts, stated that defense counsel called the night before the insanity trial was scheduled to begin to inform him that defense counsel was going to withdraw the insanity plea because defense counsel did not think the insanity case could be won in light of the jury they had. This call took place before defense counsel conferred with Mirzayance.

Mirzayance states that defense counsel talked with him for five minutes on the morning the insanity defense was scheduled to go forward and told Mirzayance that the insanity defense should be withdrawn because, with a finding of first degree murder, the insanity phase of the trial could not be won. Mirzayance explains that he was shielded from the expert testimony relating to his own mental condition. Mirzayance asserts that he had no idea that four experts were prepared to opine that Mirzayance was legally insane when counsel recommended that Mirzayance withdraw his insanity defense.

Attorney Lund, an attorney who represents the Mirzayance family in the civil action between it and defense counsel, stated that defense counsel consulted him on the morning that the insanity defense was withdrawn. Lund explains that defense

counsel recommended withdrawing the insanity defense because: 1) Mirzayance's parents were in too much pain to testify; 2) Dr. Markman assured defense counsel that Dr. Markham could arrange for Mirzayance to be placed in a safe psychiatric prison treatment facility; 3) defense counsel believed the trial judge was empathetic towards the Mirzayance family and would instruct that Mirzayance be sent to a psychiatric prison; and 4) defense counsel wanted to avoid a finding that Mirzayance was sane. Dr. Markham denies stating that he could arrange for Mirzayance's placement in a psychiatric facility.

A large number of experts were subpoenaed and ready to testify to Mirzayance's insanity. Mirzayance lacked knowledge of the evidence regarding his own mental state. Defense counsel and those with whom defense counsel spoke gave conflicting statements about why defense counsel recommended the abandonment of the insanity defense on the morning it was scheduled to begin. Given these factors, the district court abused its discretion by not holding an evidentiary hearing on this ineffective assistance of counsel claim. An evidentiary hearing will assist in determining if there were tactical reasons for abandoning the insanity defense or if the withdrawal of the defense was a wholesale abandonment of the one viable and strong defense Mirzayance had. We remand to the district court for an evidentiary hearing on this claim.

II

The district court did not abuse its discretion in dismissing the spectator misconduct claim without an evidentiary hearing. Mirzayance cannot show that the spectator conduct was "so inherently prejudicial [that it] pose[d] an unacceptable threat to [the] defendant's right to a fair trial" and that there was "an unacceptable risk . . . of impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. 560, 570, 572 (1986). This trial was not like a "mob" atmosphere. See Altemose Const. Co. & Energy Contracting Co. v. Nat'l Labor Relations Bd., 514

F.2d 8, 12-13 (3d Cir. 1975) (finding a "mob atmosphere" where defendant was "jeered by a crowd of approximately 100 workers who had gathered at the entrance [to the building]"). Rather, the state trial court closely monitored and supervised spectator conduct. Nor was this proceeding akin to Norris v. Risley, 878 F.2d 1178, 1183 (9th Cir. 1989), where the wearing of "Woman Against Rape" buttons and the serving of refreshments by members of the Rape Task Force required an evidentiary hearing. The small yellow ribbons worn by a few spectators in this case did not threaten the integrity of the proceedings.

III

The district court correctly held that counsel was not ineffective in presenting only one expert to testify about Mirzayance's mental health at the guilt phase. The choice of what type of expert to use "is one of trial strategy and deserves a heavy measure of deference." Turner v. Calderon, 281 F.3d 851, 876 (9th Cir. 2002) (internal quotation marks omitted). Dr. Satz presented a full day of testimony about Mirzayance's mental health. Any additional testimony the other experts could have offered would have been limited to the kind offered by Dr. Satz. See Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998) (holding it is not unreasonable for defense counsel to not present largely cumulative testimony). Additionally, it may have been sound trial strategy to present the mental health evidence through one expert in order to avoid creating inconsistencies among experts.

IV

Mirzayance argues that defense counsel provided ineffective assistance by failing to prepare Dr. Satz to testify at trial regarding premeditation and deliberation. However, testimony about the ultimate mental state at issue is not

admissible under California law during the guilt phase of a trial. See Cal. Penal Code § 29. As the California Court of Appeal correctly noted, the trial court warned Dr. Satz, "you can talk about any testing you gave. You can give general impressions. You cannot testify, however, specifically as to whether [defendant] premeditated in this situation, or formed a specific intent in this situation." The failure to prepare Dr. Satz on these points cannot constitute ineffective assistance of counsel.

V

Mirzayance argues that defense counsel was ineffective for failing to investigate and present at trial facts pertaining to Mirzayance's mental health, relationship with the victim, and marijuana use.

1

Mirzayance argues that defense counsel was ineffective for failing to present additional mental health evidence in addition to Dr. Satz's testimony. However, it is not unreasonable to avoid presenting cumulative mental health testimony. See Babbitt, 151 F.3d at 1174.

2

Mirzayance argues that defense counsel should have presented evidence of the amicable relationship Mirzayance had with the victim as shown through letters and photographs. However, the relationship evidence was not directly relevant as the letters and photographs were from 1992-1994, one to three years before the 1995 murder.

3

Mirzayance argues that defense counsel should have

introduced additional evidence of Mirzayance's marijuana use. However, defense counsel's tactical decision regarding how to present the marijuana case requires deference. Defense counsel presented multiple statements regarding Mirzayance's marijuana use. Defense counsel introduced Mirzayance's statements to police that he killed because he "was on the drugs," as well as the statement that Mirzayance had smoked two hashish cigarettes shortly before the murder. Mirzayance's statement to a friend that he used marijuana to make the voices in his head go away as well as Dr. Satz's testimony that schizophrenics often use marijuana to self-medicate were also introduced.

VI

Mirzayance argues that counsel was ineffective in conceding to the jury that Mirzayance was guilty of second degree murder. Defense counsel conceded that Mirzayance was guilty of second degree murder and focused on arguing that the murder was caused by Mirzayance's mental defect such that premeditation and deliberation were not present to support a first degree murder verdict. Mirzayance now argues that defense counsel should have tried to obtain a voluntary manslaughter verdict.

Given the voluntary confession from Mirzayance that he killed his cousin, and the weak evidence of provocation and imperfect self-defense, it was not objectively unreasonable for trial counsel to concede that a murder occurred, and to focus his efforts on showing that the murder was not premeditated. See People v. Lucas, 12 Cal. 4th 415, 447 (1995) (holding that in light of strong evidence that a homicide occurred, it is "entirely understandable that trial counsel . . . made no sweeping declarations of his client's innocence but instead adopted a more realistic approach . . . ." arguing that "intoxication negated the mental elements necessary for . . . premeditated murder") (internal quotation marks omitted).

Although it is possible to mount a defense for voluntary manslaughter based on either provocation, see People v. Berry, 18 Cal. 3d 509, 515 (1976), or imperfect self-defense, see In re Christian S., 7 Cal. 4th 768, 779 (1994), neither theory was supported by the evidence in this case. Manslaughter through provocation involves a killing during a heat of passion "as would naturally be aroused in the mind of an ordinary reasonable person under the given facts and circumstances . . . ." See Berry, 18 Cal. 3d at 515. In this case, it would have been difficult to argue that an "ordinary reasonable person" would have killed because his cousin accused him of being late and yelled at him. See People v. Marshall, 13 Cal. 4th 799, 849 (1996) (holding manslaughter instruction unnecessary when "relations between defendant and [the victim] . . . were generally smooth and harmonious").

Although Mirzayance stated that he killed the victim because she fought back, "No case has ever suggested . . . that such predictable conduct by a resisting victim would constitute the kind of provocation sufficient to reduce a murder charge to voluntary manslaughter." People v. Jackson, 28 Cal. 3d 264, 306 (1980), overruled on other grounds by People v. Cromer, 24 Cal. 4th 889, 898 (2001).

Similarly, a theory of manslaughter through imperfect self-defense was weak. Under a theory of imperfect self-defense, if a defendant "actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and cannot be convicted of murder." Christian S., 7 Cal. 4th at 783. However, Mirzayance was not under any threat from the victim when he began stabbing her. Two of the stab wounds were fatal. Counsel was not ineffective for choosing not to argue for voluntary manslaughter.

VII

Mirzayance argues that counsel was ineffective for failing

to request a modified instruction of CALJIC 4.21. CALJIC 4.21 reads, in pertinent part,

> If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in deciding whether defendant had the required [specific intent] [mental state].

Mirzayance argues that defense counsel should have requested a modified version of CALJIC 4.21 which would have added "or had a mental defect" after "intoxicated." However, defense counsel did advocate for an instruction similar to modified CALJIC 4.21 and vigorously objected to the contrary instruction given by the trial judge.

During discussions with counsel, the judge stated his intention to instruct the jury that "the mental process necessary for a finding of deliberation and premeditation is not dependent on the motivation for the act nor is the necessary mental process lacking when the considerations reflected on by the defendant were the product of mental disease or defect." (emphasis added). Defense counsel objected, and when the court indicated its decision to allow the instruction, defense counsel requested an additional instruction to read: "However, you should consider all the defendant's mental processes at the time of the killing as you understand them to be in weighing and considering whether the defendant did in fact deliberate the commission of the crime."

The judge declined to give the supplementary instruction. Although defense counsel's request for an instruction stating that the jury could consider mental processes in determining whether the defendant premeditated or deliberated did not succeed, counsel still made these arguments to the court. Defense counsel was not ineffective for failing to request a modified form of CALJIC 4.21 as counsel argued for a similar instruction that was denied.

VIII

Mirzayance argues that counsel was ineffective because he failed to request CALJIC 8.73 (1995). CALJIC 8.73 (1995) reads,

> When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree.

The California Court of Appeal determined that counsel's presentation did not fall below an objective standard of reasonableness because there was no evidence of provocation sufficient to support a provocation instruction. The Court of Appeal explained, "[t]hat [the victim] may have been short with defendant does not establish provocation." Given the scarce evidence supporting provocation, the court of appeals' determination that counsel was not ineffective for failing to request CALJIC 8.73 was not an objectively unreasonable application of Strickland.

IX

Mirzayance argues that his counsel was ineffective for advising him to abandon the insanity defense and concurring in that withdrawal. Because we conclude that the district court abused its discretion in denying this claim without an evidentiary hearing, we do not reach the merits of this ineffective assistance of counsel claim at this stage.

X

We AFFIRM in part, REVERSE in part, and REMAND with instructions to conduct an evidentiary hearing on whether counsel was deficient for recommending and concurring in the withdrawal of the insanity defense, and if so, whether this ineffectiveness prejudiced Mirzayance.

Each party shall bear its own costs.

APPENDIX E

FILED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JUL 13 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE, Petitioner, v. RODNEY HICKMAN, Warden Respondent.	No. CV 00-01388 DT (AIJ) JUDGMENT

Pursuant to the Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice.

DATED: July 12, 2001

/S/
DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
JUL 12 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JUL 13 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE, Petitioner, v. RODNEY HICKMAN, Warden Respondent.	No. CV 00-01388 DT (AIJ) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the court has reviewed the Petition for Writ of Habeas Corpus, all of the records herein, the attached Report and Recommendation of United States Magistrate Judge and the objections to the Report and Recommendation which have been filed herein. The court concurs with and adopts the findings and conclusions of the Magistrate Judge after having made a de novo determination of the portions to which objections were directed.

IT IS ORDERED that Judgment be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation, and the Judgment herein by United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: July 12, 2001

/S/
DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

FILED
CLERK, U.S. DISTRICT COURT
JUN 28 2001
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDRE MIRZAYANCE, Petitioner, v. RODNEY HICKMAN, Warden Respondent.	No. CV 00-01388 DT (AIJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dickran Tevrizian, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEDURAL HISTORY

Petitioner was charged by information with one count of first degree murder. (Return, Exh. F at F415; 1 Clerk's Transcript ("C.T.") 54-55). The information further alleged that petitioner personally used a firearm and deadly weapon in the commission of the offense. (Id.) Petitioner denied the charges and entered a plea of not guilty and an additional plea of not guilty by reason of insanity (hereafter, the "insanity plea"). (Return, Exh. F at F415; 1 C.T. 64, 68-70).

At the conclusion of the trial's guilt phase, the jury found petitioner guilty of the murder and found true the firearm and deadly weapon allegations. (Return, Exh. F at F415; 2 C.T. 266). Petitioner thereafter withdrew his insanity plea and waived further proceedings on this issue. (Return, Exh. F at F415). The court sentenced petitioner to state prison for a total term of twenty-nine years to life. (Id. at F415-F416; 2 C.T. 285).

Petitioner appealed his conviction. (Return, Exh. A). Petitioner also filed a habeas petition in the California Court of Appeal, which the court considered concurrently with his appeal. (Id., Exh. D; Exh. E at E413; Exh. F at F414; Exh. G at G446). On March 31, 1999, the appellate court affirmed the judgment and denied the habeas petition. (Id., Exh. F at F414, F444; see also id., Exh. G at G445-G446). On May 4, 1999, the appellate court also denied petitioner's petition for rehearing. (Id., Exhs. H, I).

Petitioner filed a petition for review in the California Supreme Court, which that court denied on July 14, 1999 without comment or citation. (Id., Exhs. J, K). Petitioner filed a habeas petition in the California Supreme Court, which that court denied on December 1, 1999 without comment or citation. (Id., Exhs. L, M).

Petitioner filed the instant petition in this court on February 9, 2000. Respondent filed his return on May 24, 2000, and petitioner filed his traverse on July 17, 2000.

The matter is now deemed submitted and ready for decision.

STATEMENT OF FACTS

The conviction in this case arose from petitioner's murder

of his cousin, Melanie Ookhtens, in Los Angeles, California.[1/] (Return, Exh. F at F415-F416; see 4 R.T. 684).

In two tape-recorded statements to police, petitioner described the circumstances of the murder. (Id. at F416). Petitioner stated that he was at the Ookhtens' home on the evening of October 13, 1995. (Id.) Ookhtens arrived home at around seven p.m. (Id.) According to petitioner, Ookhtens was angry because she saw that petitioner was watching television and told petitioner that they needed to pick up her parents at the airport. (Id.) Ookhtens then went upstairs to her bedroom. (Id.)

Petitioner stated that he waited about forty seconds, then went to Ookhtens' bedroom, knocked on the door, and asked what she was doing. (Id.) Ookhtens replied that she was getting dressed. (Id.) Petitioner complained that they were late, and Ookhtens repeated that she was getting dressed. (Id.)

When petitioner started to enter Ookhtens' room, she told him to get out. (Id.) Petitioner became angry and, after taking a hunting knife from his pocket, entered the room. (Id.) Petitioner approached Ookhtens, who was sitting on her bed. (Id.) Ookhtens asked him what he was doing with the knife. (Id. at F417). Petitioner then stabbed her in the stomach and neck. (Id.)

Ookhtens hit petitioner, and screamed at him to stop. (Id.) Instead, petitioner threw the knife out the bedroom door, took a .25 caliber handgun from his pocket and, from a distance of three feet, shot Ookhtens once in the stomach and three times in

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1. The court cites to the factual background in the opinion of the California Court of Appeal. (Return, Exh. F at F416-F420). In addition, this court independently has reviewed the relevant portions of the record.

the head.[2/] (Id.) Petitioner later told police that he shot Ookhtens because she fought back when he stabbed her. (Id.)

Petitioner took the knife and some of his clothes that were at the Ookhtens' home and returned to his apartment in Pasadena, California. (Id.) Petitioner took off his bloody clothes, took a shower, and then put the bloody garments into a trash bag. (Id.) At 8:07 p.m., petitioner called and left the following message on the answering machine at the Ookhtens' home:

> Melan, it's me. I'm sorry to call you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say '[H]i' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't know. Okay? So bye-bye.

(Id.)

After leaving this message, petitioner called Laurent Meira at about 8:15 p.m., and asked if they could meet. (Id.) Meira agreed, and, at about 8:30 p.m., petitioner stopped at Meira's Pasadena apartment to pick him up. (Id.) Petitioner was quiet at first, then told Meira that it was no good to be "high," and that he had "messed up big time." (Id.) Petitioner told Meira that he had shot Ookhtens three times in the head, and once in the stomach. (Id. at F417-418). Petitioner then stopped his car in front of a Burger King restaurant, took a trash bag from the trunk, and threw the bag into a trash container. (Id. at F418).

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2. Gloria Stone, the Ookhtens' neighbor, testified that she heard screaming and then gunshots from the Ookhtens' home at about 7:20 p.m. that evening. (Return, Exh. F at F417).

Petitioner then got back into the car and started driving. (Id.)

Meira suggested that petitioner drive to a police station. (Id.) After thinking about it for a moment, petitioner agreed, stopping to buy a drink at a 7-Eleven store before driving on to the Pasadena Police Station. (Id.)

At about 9:30 p.m., petitioner approached Sergeant Michael Korpal of the Pasadena Police Department. (Id.) Petitioner told Korpal, "I messed up tonight, I killed my cousin." (Id.) Petitioner also told Korpal that he had smoked a couple of hashish cigarettes about an hour before the shooting, and that he thereafter had an argument with his cousin, followed her upstairs to her bedroom, and shot her. (Id.) Korpal handcuffed petitioner, and took him and Meira into the station.[3/] (Id.)

After being advised of and waiving his constitutional rights, petitioner told Korpal what had taken place. (Id.) Among other things, petitioner stated that he was angry at Ookhtens because she had hung up on him the previous day. (Id.) The following morning, petitioner also spoke to Detective Robert Felix about the shooting, and told him that he had bought the gun he had used about five or six weeks before. (Id.) Petitioner said that he had been carrying the gun in his pocket for the three days prior to the shooting, but did not know why he had done so. (Id.) Petitioner said that he had the knife in his possession only that day. (Id.)

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3. Following a consensual police search, a .25 caliber handgun, and ammunition were retrieved from petitioner's car. (Return, Exh. F at F418). A .25 caliber shell casing was recovered from petitioner's pocket. (Id.) The trash bag petitioner threw away was also recovered, and found to contain petitioner's bloody clothing. (Id.)

Petitioner told Felix that, the day before the shooting, petitioner called Ookhtens and asked what she would be doing the following day. (Id.) According to petitioner, Ookhtens responded, "I can't really talk to you, I have to go. Bye." (Id.) Petitioner said that this response angered him. (Id.)

Petitioner also told Felix that he shot Ookhtens "[b]ecause she was getting too much, was causing too much bad stuff on me when I did nothing; that's why. And for the fact that I was on the drugs, I didn't think what I was doing." (Id. at F418-F419).

It was later determined that Ookhtens suffered three gunshot wounds to the head (including two to the right temple and one to the top of the skull), one gunshot wound to the abdomen, and nine stab wounds, including two to the chest. (Id. at F417). The two gunshot wounds to the temple were consistent with petitioner having shot Ookhtens while he stood over her as she sat on the bed. (Id.) The gunshot wound to the top of the skull was consistent with petitioner having shot her after she was laying on the ground. (Id.) Any of the gunshot wounds would have been fatal. (Id.) Either of the two stab wounds to Ookhtens' chest also would have been independently fatal. (Id.)

The urine sample petitioner provided after the offense tested negative for the presence of marijuana and hashish, a result that was inconsistent with petitioner's claim that he had smoked two hashish cigarettes earlier. (Id. at F418). As discussed below, petitioner presented a mental health defense at trial regarding his ability to premeditate and deliberate the crime. (Id. at F419-F420).

PETITIONER'S CONTENTIONS

1. Petitioner was deprived of due process by an

"unremitting display of spectator misconduct" by the victim's family and supporters, which tainted the trial and prejudiced the jury, in violation of the Fifth, Sixth, and Fourteenth Amendments. (Petition at 6).

2. The trial court committed constitutional error by accepting the withdrawal of petitioner's insanity plea at the conclusion of the guilt phase without making the proper determination as to whether the withdrawal was voluntary and intelligent, "in contravention of rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments." (Id. at 7; Supplemental Petition at 15).

3. Petitioner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments when his trial counsel: (a) called "but one defense witness who was ill prepared to give testimony, much less be the witness through which all of the evidence [relating to petitioner's mental state defense] could be presented" during the trial's guilt phase; (b) conceded second degree murder to the jury when a viable manslaughter defense existed; (c) presented a "token mental state defense to the deliberation element of first degree murder when a wealth of other expert evidence was available"; (d) failed to produce "other available non-expert evidence to refute prosecution arguments"; (e) failed to investigate the case; (f) withdrew "an extremely strong NGI defense without a tactical reason or any benefit whatsoever"; (g) advised petitioner "to give up the insanity defense without informing him of the expert witnesses who would testify he was legally insane"; (h) advised petitioner to withdraw his not guilty plea without an evaluation of his mental state for competence; (i) failed to examine the evidence, corroborate petitioner's use of marijuana, or confer meaningfully with petitioner; and (j) failed to request jury "instructions on mitigating mental states to refute premeditation and deliberation." (Petition at 7-8).

4. "Prosecutorial misconduct prejudiced petitioner's fair trial rights during final argument by criticizing Dr. [Paul] Satz's testimony for not discussing petitioner's ability to premeditate, the very point [the prosecutor] had earlier had the court prohibit him from mentioning. Alternatively, if the argument was proper, then counsel was ineffective for not calling six experts to testify that petitioner's mental infirmities drastically impeded any capacity for premeditation and deliberation." (Id. at 8).

STANDARD OF REVIEW

This court may grant federal habeas corpus relief only if Petitioner "is in custody in violation of the Constitution or laws or treaties of the United States."[4/] 28 U.S.C. § 2254(a). The Antiterrorism and Effective Death Penalty Act imposes new requirements for the granting of habeas relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" Supreme Court

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4. State law errors are not cognizable on federal habeas corpus. 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 480 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S. Ct. 871, 874 (1984).

precedent if the state court applies a rule that contradicts the governing law set forth in such precedent, or confronts a set of facts that are materially indistinguishable from such precedent, and, nevertheless, arrives at a different result. Williams v. Taylor, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 1523 (2000).

A state court decision makes an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule from such precedent, but unreasonably applies it to the facts of the case, or either unreasonably extends a legal principle from such precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply. Id. The Ninth Circuit has held that, under Williams, "in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous." Tran v. Lindsey, 212 F.3d 1143, 1149 (9th Cir.), cert. denied, ___ U.S. ___, 121 S. Ct. 340 (2000); see also Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

DISCUSSION

A. Petitioner's Claim Alleging Spectator Misconduct Does Not State a Federal Constitutional Violation.

In his first claim, petitioner contends that he was deprived of due process by an "unremitting display of spectator misconduct" by the victim's family and supporters, which allegedly tainted the trial and prejudiced the jury in violation of the Fifth, Sixth, and Fourteenth Amendments. (Petition at 6). According to petitioner,

> the family and supporters of the victim daily packed the undersized . . . courtroom and adjacent hallways and made evident their presence and intensely partisan feelings to the jury through clothing, yellow ribbons, courtroom outbursts of weeping, groaning,

> facial grimaces, and verbal attacks on petitioner's family and attorneys. The result was that the case was tried in a highly emotionally charged atmosphere .... The trial court took no corrective action to stop the spectator misconduct and keep it from unfairly influencing the jurors. As a result, petition[er] was denied the basic American constitutional guarantee of a fair trial by an unbiased jury.

(Supplemental Petition at 5 , 14-15). In support of this claim, petitioner cites to "on the record" occurrences, as well as "matter[s] the attorneys and judges may not have seen or heard, but the jury [allegedly] did." (Id. at 5-14).

The appellate court rejected petitioner's claim of spectator misconduct, noting that there was nothing in the record to suggest that this alleged misconduct had been brought to the attention of the trial court "so that it could eject from the courtroom any person or persons creating a disturbance or otherwise threatening the fairness of the proceedings, nor that he requested any admonition to the jury to ignore the alleged misconduct." In light of these circumstances, the court of appeal concluded that petitioner had not been deprived of due process due to spectator misconduct.[5/] (Return, Exh. F at F443).

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5. Petitioner subsequently asserted this and the petition's other claims before the California Supreme Court on direct and collateral review. (Return, Exhs. J and L). That court denied the claims without reasoned opinions. (Id., Exhs. K and M). Under the "look through rule" of Ylst v. Nunnemaker, this court presumes that the Supreme Court's silent denials adopted the reasoning of the Court of Appeal with respect to all the claims herein, and, therefore, this court will "look through" the Supreme Court's silent denials to the opinion of the Court of Appeal. 501 U.S. 797, 803, 111 S. Ct. 2590, 2594 (1991).

1. The State Court's Conclusion That Petitioner Received a Fair Trial Is Not an Unreasonable Application of Federal Law to the Facts of Petitioner's Case.

Although predicated on an unreasonable recapitulation of the record in petitioner's case, the ultimate decision of the California Court of Appeal, i.e., that petitioner received a fair trial and the constitutional protections of due process, is not clearly erroneous.[6]

Due process guarantees a criminal defendant a "'fair trial in a fair tribunal.'" Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997) (citation omitted). "Central to the right to a fair trial . . . is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence offered at his trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 475 U.S. 560, 567, 160 S. Ct. 1340, 1345 (1986) (citation omitted).

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6. The appellate court rejected petitioner's claim of spectator misconduct based on an erroneous belief that petitioner's counsel had not contemporaneously objected to the audience's behavior. (Return, Exh. F at F433). The record, however, shows that defense counsel asserted a number of objections to what he thought the spectators were doing during petitioner's trial, and called those matters to the court's attention. (Return, Exh. D at D297-298, D338, D352; Supplemental Petition at 4-15; 2 R.T. 310-11; 3 R.T. 483-84; 4 R.T. 686-92). The state court's factual determination that petitioner had not preserved this objection at trial is, therefore, an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

Certain trial circumstances pose a threat to the fairness of the fact-finding process and, as such, they are considered inherently prejudicial. Id. at 567-68, 106 S. Ct. at 1345 (citations omitted). However, even an inherently prejudicial practice is permissible if it is "justified by an essential state interest specific to each trial." Holbrook, 475 U.S. at 568-69, 106 S. Ct. at 1345-46; Estelle v. Williams, 425 U.S. 501, 504-05, 96 S. Ct. 1691, 1693 (1976); Morgan v. Bunnell, 24 F.3d 49, 51 (9th Cir. 1994).

If, however, the challenged circumstance is not considered to be inherently prejudicial, the court must then determine whether the petitioner was actually prejudiced by it. Holbrook, 475 U.S. at 572, 106 S. Ct. at 1347-48.

Thus, when reviewing a constitutional challenge to a state court proceeding, the federal court must "look at the scene" created for the jurors, and decide whether what the jurors saw was "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." Id., 475 U.S. at 567, 160 S. Ct. at 1345. If the challenged practice is not found inherently prejudicial, then the court must consider whether the defendant suffered actual prejudice from the challenged conduct. Id. If actual prejudice cannot be established, then petitioner's due process claim fails. Id.

a. Petitioner's Claim that the Jury Was Adversely Influenced by Disruptive Spectator Behavior During His Trial Is Not Supported by the Record.

Although petitioner claims that the victim's supporters repeatedly disrupted the proceedings and interfered with the jury's impartial determination of the issues presented, the record fails to support that contention.[7/] For example, petitioner

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7. Petitioner's declarations attesting to examples of

contends that during the testimony of his expert, Dr. Satz, the audience was responding verbally and facially to the testimony. (3 R.T. 483-84). The trial judge, however, who was watching the spectators and jury during Dr. Satz's examination, found that the spectators had not grimaced or audibly reacted to the testimony.[8/] (3 R.T. 484). Similarly unsubstantiated is petitioner's claim that an unidentified spectator's sobbing was heard by the jury. (2 R.T. 421-23). Nor does the record support petitioner's assertion that the jury saw, heard, or knew about a confrontation between petitioner's father and a member of the victim's family.[9/] (2 R.T. 310; see 3 R.T. 484). Nor is there

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spectator misconduct "that the attorneys and judges may not have seen or heard" cannot be considered as part of the record in this case. (Petition Memorandum at 13; Supplemental Petition at 9-14). None of the declarations establish that the jurors saw these otherwise unobserved instances of spectator misconduct. As such, these alleged events cannot be considered to make up the "scene presented to jurors" at petitioner's case, nor can they constitute a source of actual prejudice. See Holbrook, 475 U.S. at 567, 160 S. Ct. at 1345.

8. Petitioner fails to provide clear and convincing evidence to rebut the trial court's findings regarding the spectators' conduct. Although the petitioner submitted declarations from Dr. Satz and his colleague, their statements fail to establish what (if anything) the jury saw or heard, and are also impermissibly vague as to time, duration, place and description. (Supplemental Petition at 11-12). In the absence of evidence to the contrary, this court must defer to the factual findings of the trial judge. See Bains v. Cambra, 204 F.3d 964, 972 (9th Cir.), cert. denied, ___ U.S. ___, 121 S. Ct. 627 (2000).

9. Petitioner's reliance on a witness' tears to establish spectator misconduct is wholly misplaced. After viewing a photograph of the victim, Grigor Atoian started to cry. (4 R.T.

anything in the record that supports petitioner's claim that the jury understood and was influenced by the yellow ribbons worn by the victim's mother and six other unidentified spectators. (Supplemental Petition at 6 , 11-12). Petitioner fails to establish that the jury noticed the ribbons, that they knew the meaning of the ribbons, or that the ribbons were interpreted by the jury as a validation of petitioner's guilt.[10/]

b. The Trial Judge's Repeated Admonitions Reduced Further the Prospect that the Jury was Influenced by the Spectators' Presence in the Courtroom.

In assessing petitioner's claim that the spectator's behavior was "inherently prejudicial," the court must consider the totality of the circumstances, including whether the court provided curative instructions or admonitions. See Sheppard v. Maxwell, 384 U.S. 333, 352-63, 86 S. Ct. 1507, 1517-23 (1966). In this

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686-90). The court immediately called a five-minute recess and dismissed the jury. (Id.) The trial judge denied petitioner's request to instruct the jury that they were to disregard the witnesses tears and to sanction the prosecution, although it granted the request to strike the witness' identification testimony from the record. (4 R.T. 690-92). The court noted that the spectators and witnesses had done a commendable job of keeping their emotions in check and that it was unreasonable to expect the proceedings to be entirely devoid of any emotions. (4 R.T. 691). After regaining his composure and assuring the court that he could proceed without further emotion, Atoian resumed his testimony and apologized to the court for his earlier reaction. (4 R.T. 692-97).

10. Compare, e.g., Norris v. Risley, 878 F.2d 1178, 1181-83 (9th Cir. 1989) (unfair trial circumstances could be shown where spectators wore large "Women Against Rape" buttons during the trial of an accused rapist).

case, the trial judge started the trial with an admonition to the spectators:[11/]

> It's been my experience that in trials [that] it's very difficult sometimes for family members or friends to sit and listen to evidence. [¶] I know you are human beings and will have responses. But I don't want anything that will interfere with the jurors. They have a very difficult task. Just do your best to control your emotions. [¶] I know that will be difficult for people. If you find yourself getting into a position where it's really very difficult or disturbing for you, I would recommend that you go outside then, because I don't want to be in a situation to stop and address things. I think it just calls more attention to it.

(1 R.T. 56).

On three subsequent occasions, the judge further admonished the audience. After defense counsel complained about the spectators during Dr. Satz's examination, the trial judge warned the audience that if he observed any grimacing or other expressions from spectators, he would not hesitate to order the gallery cleared. (3 R.T. 484). And, at two later points in the proceeding, the court sua sponte warned the spectators against talking while the court was in session and instructed them that they were not to react visually to the testimony being given. (3 R.T. 510, 557-58).

The trial judge also advised the prosecution to ensure that the jurors had no contact with the family and friends of the victim, and instructed them to wait until the jurors were excused before leaving the courtroom. (3 R.T. 485).

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11. Later in the trial, the judge repeated his admonition to the spectators, outside of the presence of the jury. (2 R.T. 310-11).

Given the trial judge's careful monitoring of the situation and his success at keeping the emotional issues present during petitioner's trial in check, it cannot be concluded that the "scene presented to jurors" was inherently prejudicial. See, e.g., Norris, 878 F.2d at 1183. Nor can this court find that the wearing of yellow ribbons and some shedding of tears by family members and a single witness caused petitioner actual prejudice. Holbrook, 475 U.S. at 567, 160 S. Ct. at 1345; Sheppard, 384 U.S. at 352-63, 86 S. Ct. at 1517-23; Norris, 878 F.2d at 1182.

Petitioner's first claim, therefore, should be dismissed with prejudice.

B. Petitioner States No Federal Constitutional Violation Regarding His Decision to Abandon His Insanity Plea.

In his second claim, petitioner contends that the trial court's decision to allow him to withdraw his insanity plea without first making a determination that the decision was both voluntary and intelligent, constitutes a violation of "the Fifth, Sixth, and Fourteenth Amendments." (Petition at 7; Supplemental Petition at 15). Petitioner asserts that if the trial court had conducted a proper inquiry, it would have discovered that petitioner was "indisputably psychotic," sleep deprived, "taking heavy doses of anti-psychotic and anti-depressant medication," and incapable of making a rational choice about how to proceed. (Supplemental Petition at 15-24). Further, petitioner complains that he had been "intentionally shielded from any knowledge of the nature and magnitude of his mental disorders by his attorneys and psychiatrists" and had been led to believe that his case was hopeless. (Id.) Thus, petitioner contends that the trial court's acceptance of the withdrawal of his insanity plea did not comport with due process. (Id.)

As with petitioner's first claim, the record does not

comport with petitioner's version of events surrounding the withdrawal of his insanity plea. The record demonstrates that the trial court conducted an extensive voir dire, with defense counsel's assistance, to verify that petitioner fully understood the ramifications of his decision to withdraw his plea, including expressly stating the sentencing consequences of that decision. (5 R.T. 873-78). The trial judge also specifically inquired regarding petitioner's medications, and was able to verify that petitioner was currently taking his medications as prescribed. (5 R.T. 877). Nothing about this aspect of the proceeding supports petitioner's contention that his medication and psychotic condition precluded him from assisting in his defense and participating in the case.[12/] Petitioner had taken these medications from the beginning of the trial proceedings in this case. (1 R.T. 16-17).

Nor is there any support in the record for a claim that petitioner was not fully informed with regard to the

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12. Petitioner does not argue, nor does the record support, that the medication affected his competence to stand trial. (Id.; 5 R.T. 877). Cf. Godinez v. Moran, 509 U.S. 389, 398, 113 S. Ct. 2680, 2686 (1993) (competence standard for pleading guilty is the same as the competence standard for standing trial, and is not a higher standard). Although petitioner has submitted declarations from various mental health professionals stating that it was "unlikely" that he was competent to waive his plea as a result of his alleged mental health problems, petitioner does not dispute that he was competent to stand trial, the guilt phase of which had ended the previous day. (5 R.T. 865-73). Indeed, petitioner contends that he would have been competent to proceed with the remaining trial proceedings had the insanity phase gone forward the very day he waived the option of doing so. (Petition at 8; Petition Memorandum at 29-30; Supplemental Petition at 16, 53-64; Traverse at 23-25).

consequences of his decision to withdraw his insanity plea and his reasons for doing so. After the jury reached its verdict in the guilt phase, defense counsel informed the court that petitioner wished to withdraw his insanity plea, and forego the trial's upcoming insanity proceedings .[13] (5 R.T. 873-74). Counsel stated that petitioner's decision centered upon counsel's "firm belief" that the empaneled jury would not find petitioner insane based on the psychiatric, psychological and other testimony that counsel had to present. (Id.) Although counsel acknowledged that he could file a motion to empanel a new jury to consider the question of petitioner's sanity, he did not believe that any such motion would be successful. (Id.)

Counsel expressly told the court that he had discussed the matter with petitioner and that, based on counsel's recommendation, petitioner was willing to "waive and give up his right to continue his plea of not guilty by reason of insanity and to withdraw that plea at this time." (5 R.T. 874). Petitioner, who wae present during counsel's colloquy with the trial judge, did not dispute the statements of his counsel. (Id.)

The court agreed to allow counsel to "take the waiver" from petitioner. (Id.) In response to counsel's questions,

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13. Under California law, if a defendant pleads not guilty and joins it with a plea of not guilty by reason of insanity, the issues of guilt and insanity are tried separately. People v. Hernandez, 22 Cal. 4th 512, 520, 93 Cal. Rptr. 2d 509, 514 (2000). In this case, petitioner initially entered both such pleas, and elected to waive his insanity plea only at the conclusion of the guilt phase of his trial. (1 C.T. 68-69; 5 R.T. 873-78). A defendant may withdraw his insanity plea, even after a guilty verdict has been reached following the conclusion of the trial's guilt phase. See Hernandez, 22 Cal. 4th at 520, 93 Cal. Rptr.2d at 514; People v. Redmond, 16 Cal. App. 3d 931, 938, 94 Cal. Rptr. 543, 548 (1971).

petitioner stated that he understood (1) that he had previously entered a plea of not guilty by reason of insanity; (2) that the jury in his case "now has an opportunity to determine from the evidence [petitioner was] going to present and from the evidence previously presented in the trial" whether or not petitioner was insane at the time the offense was committed; (3) that petitioner bore the burden of proving his insanity by a preponderance of the evidence; and (4) that a finding of insanity by the jury would result in petitioner's "place[ment] in the mental health system, and that the mental health system would determine if and when [petitioner] were ever to be released; and [that petitioner would have] a right to come back to court and have a jury again determine whether [petitioner was] safe to be in the community; and while in the mental health system, [petitioner] could be placed in various institutions and perhaps even on an outpatient basis." (5 R.T. 874-75).

The court then informed petitioner that if he were to withdraw his insanity plea, he would forgo his jury or court trial to determine whether he was sane or insane at the time of the offense, and asked petitioner whether he understood this consequence. (5 R.T. 875). Petitioner responded that he did. (Id.) The court told petitioner that, as a result of withdrawing the insanity plea, "the question of your insanity will not be considered, and you will be presumed sane at the time of the crime." (Id.) Again, when asked whether he understood, petitioner responded that he did. (5 R.T. 875-76).

The court, defense counsel, and the prosecution then discussed sentencing considerations with petitioner. (5 R.T. 876). The court informed petitioner that, as a result of the plea withdrawal, he would be "sentenced into the criminal justice system, which means you will be sentenced to the adult authority for a term of imprisonment to be set by the court." The court then asked whether petitioner understood that consequence, and petitioner stated that he did. (Id.) Defense

counsel, with input by the prosecution, also told petitioner that the court would sentence petitioner "as a matter of law, to 25 years to life," with up to ten additional years on the enhancements, "[s]o that the maximum term you could be sentenced to in the criminal justice system is 35 years to life." (Id.) When asked by his attorney if he understood that fact, petitioner responded that he did. (Id.)

Defense counsel then asked petitioner, "[i]n view of all these factors, and knowing your rights, do you waive and give up your right to continue with your previously entered plea of innocent and therefore withdraw your plea of not guilty by reason of insanity?" (5 R.T. 876-77). Petitioner responded that he did. (5 R.T. 877). Defense counsel then asked whether petitioner had "any questions" regarding the plea withdrawal. (Id.) Petitioner responded that he had "[n]o questions." (Id.)

The trial judge then noted that petitioner was "on a variety of psychiatric medications." (Id.) The court specifically asked petitioner whether he felt as though he were "right now . . . mentally and emotionally able to make that kind of a decision" to waive his insanity plea. (Id.) Petitioner responded that he was. (Id.) The trial judge asked petitioner which medications he was currently taking. (Id.) Petitioner stated that he was taking "four different ones," and identified them by name. (Id.) The court then asked petitioner whether petitioner had taken his dosage of those medications on the previous and present days, and petitioner responded that he had. (Id.)

The court asked defense counsel whether he concurred in petitioner's withdrawal of the insanity plea. (Id.) Defense counsel responded that he did concur, and noted that the withdrawal "is my recommendation also." (5 R.T. 877-78). After the court asked defense co-counsel the same question, co-counsel stated that he also concurred in the petitioner's decision to withdraw his insanity plea. (5 R.T. 878). The court then

granted petitioner's motion to withdraw the insanity plea. (Id.)

After granting petitioner's motion, the court advised counsel and petitioner that he would disclose to the jurors that petitioner had elected to forgo his insanity defense. (5 R.T. 879). The judge then asked petitioner whether he wanted to be present during this discussion, and petitioner indicated that he would prefer to leave the courtroom. (Id.) After petitioner left, the judge called the jury in and, in the presence of defense counsel and the prosecution, informed the jury of the plea withdrawal. (5 R.T. 880-81). As the judge observed:

> I think [that the waiver of the insanity plea] was given a lot of thought and consideration by [petitioner] and by defense counsel. I'm satisfied that it was not something that was hastily entered into, and that everyone is aware of the consequences of that. So the plea has been withdrawn and the verdict has been entered.

(Id.)

In ruling on petitioner's challenge to the trial court's acceptance of the withdrawal of his insanity plea, the California Court of Appeal found that due process had not been denied. (Return, Exh. F at F442). "The record reflects that the trial court reassured itself that [petitioner] was 'capable of understanding the nature and purpose of the proceedings against him, that he comprehend[ed] his own status and condition with reference to such proceedings, and that he [was] able to assist his attorney in the conduct of his defense.'" (Id., citation omitted).

The appellate court's conclusion in this regard is neither contrary to or an unreasonable application of federal decisional law on the subject. 28 U.S.C. § 2254(d). Federal law does not require trial courts to take the same waivers set forth in Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969)

when a defendant decides to forego the defense of insanity, and an insanity hearing is obviated by a resulting withdrawal of the plea. Morgan, 24 F.3d at 52. Rather, the court may fully discharge its obligations by advising the accused that he is "giving up his right to a jury trial as to sanity." (Id., citing Boykin, 395 U.S. at 243-44, 89 S. Ct. at 1712-13.

In petitioner's case, the trial judge clearly advised petitioner that he was giving up his right to a jury trial on the issue of his sanity. (5 R.T. 875-78). The trial court's acceptance of petitioner's withdrawal of his insanity plea, therefore, accords fully with the requirements of federal constitutional law.[14/] The trial judge found, based on an extensive voir dire, that petitioner understood the consequences of withdrawing the plea and wished to do so. (5 R.T. 880-81). That conclusion was not contradicted by defense counsel.[15/]

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14. Petitioner erroneously contends that the trial court had a duty to determine (1) his present sanity; (2) his ability to make rational choices; (3) his knowledge or understanding that he had a strong insanity defense and what he was giving up by the waiver; (4) whether he was under the false impression, provided by his attorney, that his case was hopeless; and (5) whether he lacked sleep, before allowing him to withdraw his plea. (Supplemental Petition at 15-24). Where, as in this case, a defendant has been found competent to stand trial, the trial court is not required to make such an inquiry. Morgan, 24 F.3d at 52.

15. See cf. United States v. Clark, 617 F.2d 180, 186 and n. 11 (9th Cir. 1980) (fact that defense counsel apparently considered defendant competent to stand trial "is significant evidence that [defendant] was competent"); Hernandez v. Ylst, 930 F.2d 714, 718 (9th Cir. 1990) (deeming "significant the fact that the trial judge, government counsel, and [defendant's] own attorney did not perceive a reasonable cause to believe

(Id.)

There is no factual basis in the record to support petitioner's claim that the trial court committed constitutional error when it accepted petitioner's waiver of his insanity plea.

Petitioner's second claim, therefore, should be dismissed with prejudice.

C. Petitioner's Claim of Ineffective Assistance of Counsel Does Not Support a Grant of Habeas Relief.

In his third claim, petitioner contends that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments when his trial counsel: (a) called only one defense witness "who was ill prepared to give testimony, much less be the witness through which all of the evidence [relating to petitioner's mental state defense] could be presented;" (b) conceded second degree murder to the jury when a viable manslaughter defense existed; (c) presented a "token mental state defense to the deliberation element of first degree murder when a wealth of other expert evidence was available"; (d) failed to produce "other available non-expert evidence to refute prosecution arguments"; (e) failed to investigate the case; (f) withdrew "an extremely strong" insanity defense without a tactical reason or any benefit whatsoever"; (g) advised petitioner "to give up the insanity defense without informing him of the expert witnesses who would testify he was legally insane"; (h) advised petitioner to withdraw his not guilty plea without an evaluation of his mental state for competence; (i) failed to examine the evidence, corroborate petitioner's use of marijuana, or confer meaningfully with petitioner; and (j) failed to request jury "instructions on mitigating mental states to refute premeditation and deliberation." (Petition at 7-8).

[defendant] was incompetent").

The Sixth Amendment guarantees the effective assistance of counsel. Strickland v. Washinston, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063 (1984). To prevail on a claim that counsel's assistance was so defective as to require reversal of a conviction, a petitioner must show that: (1) the assistance provided by his counsel fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 687-88, 694, 104 S. Ct. at 2064, 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068.

It is strongly presumed that counsel's conduct is within the range of reasonable assistance, and that counsel exercised acceptable judgment. Id. at 689, 104 S. Ct. at 2065; Kimmelmann v. Morrison, 477 U.S. 365, 382, 106 S. Ct. 2574, 2586-87 (1986) (Strickland imposes a "highly demanding" standard on petitioner to demonstrate that counsel's conduct constituted "gross incompetence").

Further, "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . [i]f it is easier to dispose of an ineffectiveness claim of the ground of sufficient prejudice . . . that course should be followed." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069; see also Smith v. Robbins, 528 U.S. 259, 286 n. 14, 120 S. Ct. 746, 764 n. 14 (2000); Villafuerte v. Stewart, 111 F.3d 616, 630 (9th Cir. 1997), cert. denied, 522 U.S. 1079, 118 S. Ct. 860 (1998); Williams v. Calderon, 52 F.3d 1465, 1470 n. 3 (9th Cir. 1995), cert. denied, 516 U.S. 1124, 116 S. Ct. 937 (1996). An ineffectiveness claim fails if the court determines that counsel's performance was either reasonable or not prejudicial. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

1. Petitioner Was Not Prejudiced by Counsel's Presentation of the Mental Health Defense and Related Issues.

Petitioner contends that counsel was ineffective during the guilt phase of the trial for relying on a single witness, psychologist Dr. Satz. (Supplemental Petition at 24). According to petitioner, Dr. Satz had little experience in criminal proceedings and was too inexperienced to be relied upon as the sole witness in support of petitioner's primary defense.[16/] (Id.) Petitioner characterizes counsel's efforts as only a "token mental health defense" and cites to counsel's failure to present and investigate other evidence that would have supported the mental health defense and refuted the prosecution case in other respects.[17/] (Id. at 24-29).

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16. There is nothing in the record that supports petitioner's characterization of Dr. Satz's experience. In his declaration, Dr. Satz averred that he has court experience and expertise "which spans three decades" in the civil arena of the state and federal courts, including testifying on mental health issues such as competency; has testified in criminal trials; as of 1994, had written or co-written "over 300 professional articles in the area of psychology, medicine and the behavioral sciences"; and, as of the date of his declaration, was retained by the Los Angeles Police Department and District Attorney's Office to determine competency issues. (Petition, Exh. 21 at 1-6). Further, the record reflects that, at defense counsel's request, Dr. Satz extensively prepared for the trial. (Return, Exh. F at F419-F420; Petition, Exh. 21 at 1-6 and Exhs. A and B; Supplemental Petition at 30-33).

17. As "other evidence" that allegedly would have supported the mental health defense and rebutted the prosecution case in other respects, petitioner points to (1) the victim's "friendly" phone calls and letters to petitioner; (2) the

Petitioner argues further that his counsel erred in ignoring the "voluminous expert and lay witness testimony" on petitioner's mental health to support a defense of manslaughter. (Supplemental Petition at 25; Petition Memorandum at 48-53).

In rejecting these contentions, the California Court of Appeal stated:

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anticipated testimony of petitioner's friend that petitioner was a chronic marijuana user and that petitioner was in a "protective brotherly relationship" with the victim; (3) photographs attesting to the "very close and loving" relationship between petitioner and the victim; and (4) lay and documentary evidence that, in the year before the murder, petitioner had been in a car accident, his car had been stolen, his replacement car vandalized, his apartment possessions stolen, and petitioner had been in a rollover car accident -- "all of which purportedly "further[ed] his decline into psychosis." (Supplemental Petition at 25-27; Petition Memorandum at 36). As examples of counsel's alleged failure "to competently investigate the case," petitioner cites (1) his counsel's apparent abandonment of his "announced plans to take a 'split' of the urine" tested; (2) counsel's failure to contact persons who could attest to petitioner's allegedly "mentally troubled youth in France"; (3) counsel's failure to contact petitioner's aunt, who allegedly would have testified that petitioner called her the morning of the murder to tell her that he expected to accompany the victim to the airport to pick up her parents that evening; (4) counsel's failure to adduce evidence that petitioner had retrieved photographs to give to the victim before he killed her; (5) counsel's failure to investigate the people petitioner had been with the week before the murder or to interview petitioner's brother; and (6) counsel's failure to determine that a suitcase in a photograph of the victim's room belonged to the victim, and not petitioner, as counsel argued. (Supplemental Petition at 27-29, 34-36).

> Apart from whether trial counsel's representation "'fell below an objective standard of reasonableness . . . under prevailing professional norms,'" which we do not find, [petitioner] has failed to establish prejudice. We find there to be no reasonable probability that, but for counsel's alleged errors, a different verdict would have been reached. None of the exculpatory evidence [petitioner] recites, including evidence of his mental disorder, was reasonably likely to persuade a jury that [petitioner] did not premeditate and deliberate the killing.

(Return, Exh. F at F443).

The appellate court's conclusion is neither contrary to or an unreasonable application of federal decisional law on the subject. 28 U.S.C. § 2254(d). If the court assumes, arguendo, that counsel failed to put on more than a "token" mental health defense, petitioner still is unable to demonstrate that he was prejudiced by this omission.[18/] The prosecution adduced overwhelming evidence of premeditation and deliberation in the days before petitioner shot his cousin. Petitioner had obtained a gun and had carried it with him for several days before using it to shoot Ookhtens. (Return, Exh. F at F429). And, petitioner had been carrying a knife for the entire day of the killing. (Id.) The petitioner stabbed Ookhtens multiple times and shot her at

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18. Although petitioner contends that his counsel should have put on evidence of petitioner's "troubled" mental history, particularly as it related to his youth in France, such evidence was largely cumulative to other evidence already offered at trial, and, thus, counsel's failure to offer cumulative evidence does not constitute ineffective assistance. Carriger v. Lewis, 971 F.2d 329, 332-34 (9th Cir. 1992) (counsel's failure to introduce cumulative evidence did not constitute ineffective assistance of counsel), cert. denied, 507 U.S. 992, 113 S. Ct. 1600 (1993).

close range. This evidence of planning and manner-of-killing further buttressed the prosecution case. Given these facts, it cannot be said that petitioner was prejudiced by his counsel's failure to bring additional mental health experts or to adduce other evidence regarding his close relationship with the victim or his use of illegal drugs.[19/] Petitioner's claim of ineffective assistance of counsel, therefore, must fail. See Strickland, 466 U.S. at 687-88, 694, 697, 104 S. Ct. at 2064, 2068-69.

Nor can petitioner demonstrate prejudice from his counsel's refusal to adduce contradictory expert testimony in an effort to convince the jury to convict petitioner of manslaughter. (Supplemental Petition at 25; Traverse at 18). Although petitioner claimed to have shot and killed his cousin because she defended herself against his stabbing her with a knife, there is nothing in the case to suggest a "heat of passion defense" would have been viable. There is no probability that the jury, which rejected a finding of second degree murder based on similar arguments by defense counsel, would have found petitioner guilty of the lesser offense of manslaughter. Again, given the exceedingly strong evidence of premeditation and deliberation in this case, petitioner utterly fails to demonstrate that he was prejudiced by counsel's failure to adduce what would have been

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19. Petitioner cites to anticipated testimony regarding petitioner's general marijuana use. (Supplemental Petition at 26; Petition Memorandum at 34-35). This testimony would not have shown that petitioner had smoked marijuana or hashish on the day of the murder. Counsel's refusal to have the negative drug test re-evaluated also cannot be considered ineffective, given that petitioner cites no evidence indicating that the original test was inaccurate in any way, and, thus, any reason for counsel to have it re-tested. See United States v. Bosch, 914 F.2d 1239, 1245-46 (9th Cir. 1990) (counsel was not ineffective for failing to investigate or present information that "was not so critical, or even sufficiently useful" to the defense).

a hopeless manslaughter defense.[20/] Petitioner, therefore, cannot state a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 687-88, 694, 697, 104 S. Ct. at 2064, 2068-69.

2. Counsel Was Not Ineffective Regarding Petitioner's Waiver of the Insanity Plea.

Petitioner contends that his counsel was ineffective when he recommended that petitioner withdraw his insanity plea after the conclusion of the trial's guilt phase. (Supplemental Petition at 29-30). According to petitioner, counsel's recommendation resulted from a "snap decision" that had "no reasonably strategic purpose," as the insanity defense was "supported by an abundance of expert witnesses and other testimony." (Id. at 29; Traverse at 24). Petitioner argues further that the withdrawal of his "extremely strong" insanity defense was "without any possible benefit to petitioner whatsoever, [and was made] solely because of counsel's unjustifiably pessimistic assessment that 'we can't win.'" (Traverse at 24). Petitioner contends also that counsel did not adequately confer with him regarding the recommended waiver, or determine "whether petitioner could truly understand what the significance of the waiver meant."

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20. With respect to counsel's mistakenly stating in closing argument that a suitcase at the murder scene belonged to petitioner and arguing that the fact that petitioner brought a suitcase to the victim's home to spend the weekend militated against premeditation and deliberation, the California Court of Appeal found that "[e]ven assuming the argument was not supported by the evidence, however, [petitioner] has failed to show any prejudice. It is not reasonably probable that, had defense counsel failed to make the argument, a different verdict would have been reached." (Return, Exh. F at F436). This court finds the appellate court's conclusion regarding this minor evidentiary argument to be reasonable and supported by the record.

(Supplemental Petition at 33-34; Petition Memorandum at 64).

The California Court of Appeal denied these contentions along with petitioner's other ineffective assistance claims. (Return, Exh. F at F415, F444). The appellate court's denial is neither contrary to or an unreasonable application of federal law. 28 U.S.C. § 2254(d).

As set forth above, the record reflects that, before the commencement of trial, defense counsel worked with at least seven mental health experts regarding petitioner's mental health defense as it applied to the guilt and insanity phases of the trial. (Supplemental Petition at 25, 29-34; Petition Memorandum at 32-33; see also Petition, Exh. 24 at 3, Exh. 7 at 7-8). Defense counsel then participated in a five-day jury selection process, which voir dired the prospective jurors regarding their possible biases toward mental health issues relevant to the trial's guilt and insanity phases. (See Augmented Reporter's Transcript, Vols. 1-4).

During the trial's guilt phase, Dr. Satz testified extensively regarding petitioner's mental health and decisionmaking ability, both with respect to his general history and the incident itself, with Dr. Satz's testimony and conclusions mirroring the anticipated testimony and conclusions of the other defense experts expected to testify during the insanity phase. (Return, Exh. F at F419-F420; Petition, Exh. 21 at 1-6 and Exhs. A and B; Supplemental Petition at 30-33). Despite Dr. Satz's testimony, the jury returned a verdict which found that petitioner had the ability to premeditate and deliberate the murder. (Return, Exh. F at F415; 2 C.T. 266).

Given that the jury rejected Dr. Satz's opinion that petitioner's mental impairments deprived him of the ability to perform the more demanding tasks of deliberating and planning a murder, defense counsel reasonably predicted that this same

jury would find plaintiff fully capable of discerning right from wrong and would, therefore, reject the proffered insanity defense. Defense counsel, who knew what he had to present during the insanity defense portion of the trial, made an informed decision that he did not have sufficient evidence to cause this jury to change its mind. Having concluded that there was no chance of success on the insanity defense, counsel advised his client to waive the defense and to accept the sentence of the court.[21]

Although petitioner argues that his counsel did not adequately confer with him regarding the recommended withdrawal, he admits that counsel did inform him of the factual basis for his recommendation and, at the hearing on the withdrawal of his insanity defense, petitioner did not dispute counsel's report to the court regarding their discussions of the

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21. Although counsel could have sought the empanelment of a new jury for the insanity phase under California Penal Code section 1026(a), given the extensive voir dire in this case, including the voir dire on the mental health issues relevant to the case, counsel's belief that he did not have grounds to request a new jury to decide the insanity proceedings was reasonable, as the trial court "'must assume, in the absence of any other showing, that the jury has retained its attitude of fairness and impartiality'" throughout the trial. People v. Phillips, 90 Cal. App. 3d 356, 363, 153 Cal. Rptr. 359, 363 (1979) (citation omitted). See Cal. Penal Code § 1026(a) (defendant is required in the discretion of the court to submit the issue of insanity to the same jury which passed on the issue of guilt). And, apart from the fact that failure to make such a futile motion is not ineffective assistance of counsel, James v. Borg, 24 F.3d 20, 26 (9th Cir.), cert. denied, 513 U.S. 935, 115 S. Ct. 333 (1994), there is no showing that a second jury would have been more receptive to petitioner's insanity defense.

issue.[22] (Petition, Exh. 15 at 3-4; 5 R.T. 873-78).

Accordingly, on this record, counsel's strategic decision to recommend the withdrawal of the insanity defense, made after consultation with petitioner, was not an unreasonable one, and does not constitute ineffective assistance of counsel.[23] See

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22. Though petitioner contends that his counsel did not determine whether petitioner "truly" understood the significance of the waiver, as discussed herein, the record indicates that counsel, both prior to and at the plea withdrawal hearing itself, did make such a determination, as the trial court agreed. (5 R.T. 873-78, 880-81).

23. In the instant proceeding, defense counsel submitted declarations that state that petitioner's parents' alleged refusal to testify at the insanity phase was another factor in counsel's recommendation that the insanity plea be waived. (Petition, Exh. 24 at 2-3, Exh. 4 at 4). Petitioner's parents submitted declarations which allege that they did not refuse to so testify. (Id., Exh. 16 at 16-17, Exh. 17 at 14-15). The court notes that the parents' refusal to testify at the subsequent sentencing hearing tends to support defense counsel's assertion that the parents had also earlier declined to testify at the insanity phase. (5 R.T. 897). But, even assuming that the parents would have testified at the insanity phase, such testimony would be encompassed within counsel's view that the empaneled jury would not find petitioner to be insane based on the evidence that had been or could be presented. (5 R.T. 873-74). That is, Dr. Satz testified at the guilt phase regarding the parents' discussion of petitioner's mental history, and, therefore, any testimony that the parents could give at the insanity phase would have duplicated or mirrored mental health evidence already "rejected" by the jury. (Return, Exh. F at F419). Accordingly, whether the parents would have testified would not alter the reasonableness of counsel's strategic decision to

Weber v. Israel, 730 F.2d 499, 508 (7th Cir.) (whether to withdraw affirmative defense of insanity lies within realm of attorney's tactical and strategic decisions; no claim of ineffective assistance where counsel consulted with client before withdrawing insanity plea, after counsel's proper exercise of tactical judgment and trial strategy), cert. denied, 469 U.S. 850, 105 S. Ct. 167 (1984). See also Furman, 190 F.3d at 1007; Strickland, 466 U.S. at 690, 104 S. Ct. at 2052.

3. Counsel Was Not Ineffective Regarding the Jury Instructions.

Petitioner contends that his trial counsel was ineffective when he failed to request certain jury "instructions on mitigating mental states to refute premeditation and deliberation," which would have "potentially militat[ed] against a verdict of first degree murder," and allowed the jury "the evidentiary avenues by which [a second degree murder conviction] could be reached." (Petition at 8; Petition Memorandum at 67-68). According to petitioner,

> [T]here were three evidentiary routes by which the jury could reach a second degree murder verdict: 1) provocation/sudden quarrel sufficient to raise a reasonable doubt as to deliberation but insufficient as to establish manslaughter (CALJIC 8.73); 2) intoxication from marijuana and hashish use (CALJIC 4.21); and 3) mental defect sufficient to raise a reasonable doubt as to premeditation and deliberation (CALJIC 4.21, modified).

(Petition Memorandum at 68).

Petitioner's contentions that his counsel's "failure" to request these three instructions have no merit.

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recommend the withdrawal of the plea.

a. Counsel Was Not Ineffective for Failing to Request CALJIC No. 8.73.

Petitioner contends that "Dr. Satz's testimony that an individual with a paranoid schizophrenic disorder such as petitioner becomes irrationally and uncontrollably provoked by what would objectively be viewed as small and insignificant events, e.g., [Ookhtens'] yelling at him for being late" supported the provision of an instruction on provocation and sudden quarrel pursuant to CALJLC No. 8.73. (Id. at 71). Accordingly, petitioner contends that his counsel was ineffective for failing to request the instruction. (Id.)

The California Court of Appeal disagreed, finding that trial counsel's representation did not fall below an objective standard of reasonableness, as petitioner had "not shown that he was entitled to . . . the instructions which he claims his counsel was ineffective for not requesting." (Return, Exh. F at F423).

> "CALJIC No. 8.73 is a 'pinpoint' instruction that relates particular facts to an element of the charged crimes and thereby explains or highlights a defense theory." The evidence of provocation "must 'justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately . . . .'" [¶] There was no such evidence in the case at bar. That Ookhtens may have been short with [petitioner] does not establish provocation.

(Id., citations omitted).

This court must defer to the appellate court's determination that the requested instruction was not merited under California law and the facts of the case. Bains, 204 F.3d at 972. Accordingly, defense counsel was not ineffective for failing to request CALJIC No. 8.73, as neither California law nor the evidence supported such a request. See, e.g., James, 24 F.3d at

26 (defense counsel's failure to make futile motions or present meritless claims does not constitute ineffective assistance under the Sixth Amendment).

b. Counsel Was Not Ineffective for Failing to Request CALJIC No. 4.21.

CALJIC No. 4.21 instructs a jury that it may consider evidence of a defendant's intoxication to determine whether the defendant had the requisite specific intent or mental state to commit the relevant offense. Here, petitioner contends that the "albeit conflicting" evidence of his use of marijuana or hashish immediately before the shooting entitled him to have his jury instructed pursuant to CALJIC No. 4.21 regarding whether his alleged intoxication "militated against" a finding that he had the mental state to premeditate and deliberate the murder. (Petition Memorandum at 69-70). Petitioner contends further that "there was very strong and uncontradicted evidence of a mental defect, i.e., schizoaffective disorder and psychosis, which [also] militated against premeditation/deliberation," which warranted the provision of a modified version of CALJIC No. 4.21, substituting the term "mental defect" for the term "intoxication." (Id.)

The appellate court found that "[d]efense counsel was . . . not ineffective for failing to request [either version of] CALJIC No. 4.21." (Return, Exh. F at F424). With respect to the modified "mental defect" version of the instruction, the appellate court stated that, under California law,

> the mental process necessary for a finding of deliberation and premeditation is not "lacking when the considerations reflected upon by the defendant were the product of mental disease or defect." The modified version of CALJIC No. 4.21 [petitioner] suggests should have been given would have incorrectly instructed the jury to the contrary.

(Id. at F423-F424).

This court must defer to the appellate court's determination that the requested modified instruction is incorrect under California law. Bains, 204 F.3d at 972. Accordingly, defense counsel was not ineffective for failing to request an improper instruction. See, e.g., James, 24 F.3d at 26.

With respect to the intoxication instruction, the appellate court found that

> the only evidence of intoxication was [petitioner's] statement, contradicted by the physical evidence, that he had smoked hashish and that he killed Ookhtens because he was on drugs and did not know what he was doing. Even assuming, arguendo, that such evidence would have been sufficient to warrant the giving of such an instruction had it been requested, this meager evidence of intoxication is not such that the failure to request the instruction constitutes ineffective assistance of counsel. The gist of the defense was mental illness, not intoxication, and it was not an unreasonable tactical decision to refrain from confusing the jury with less compelling theories .... In fact, with evidence as sparse on this issue as it was in the case at bar, a reasonable defense attorney could make the strategic decision that to introduce this theory of defense would strain his or her credibility with the jury on other important issues and risk an adverse verdict on those issues. Accordingly, under the circumstances here present, it was not unreasonable for trial counsel to not request the instruction.

(Return, Exh. F at F424-F425). The appellate court's conclusion is neither contrary to or an unreasonable application of federal law.

Petitioner's trial counsel reasonably could have determined that pursuing an intoxication defense, and requesting a corresponding jury instruction, had little or no merit, given that the only evidence in support of the claim were petitioner's statements, which were directly controverted by contemporaneous police drug tests conducted only a few hours after the shooting and which indicated that petitioner was not intoxicated on either hashish or marijuana. As in this case, counsel's failure to pursue a non-meritorious claim or instruction on intoxication does not constitute ineffective assistance. See Gordon v. Duran, 895 F.2d 610, 614 (9th Cir. 1990) (failure to argue claim is reasonable where attorney could have determined that claim had no merit, given circumstances of case); Shah v. U.S., 878 F.2d 1156, 1162 (9th Cir.) (an attorney is not ineffective for failing to raise a meritless legal argument), cert. denied, 493 U.S. 869, 110 S. Ct. 195 (1989).

D. Petitioner States No Claim of Prosecutorial Misconduct.

In his fourth claim, petitioner contends that the prosecutor in his case committed misconduct when she "criticiz[ed] Dr. Satz's testimony for not discussing petitioner's ability to premeditate, the very point she had earlier had the court prohibit him from mentioning." (Petition at 8; Supplemental Petition at 37-38). Specifically, petitioner contends that the prosecutor could not state in closing argument that defense expert Dr. Satz "'never gave an opinion as to whether a person like the defendant could premeditate and deliberate,'" given that "court order and state statute" did not allow Dr. Satz to testify regarding petitioner's ability to premeditate and deliberate. (Supplemental Petition at 37, quoting 4 R.T. 789). Petitioner also contends in the alternative that, if the prosecutor's argument was proper, his counsel was ineffective for failing to elicit testimony from Dr. Satz and five other experts that "a person with petitioner's mental infirmities" could not

premeditate and deliberate. (Supplemental Petition at 37-38). Petitioner's fourth claim states no basis for relief.

The California Court of Appeal rejected petitioner's claim of prosecutorial misconduct. (Return, Exh. F at F434-F435).

> [W]e note that the prosecutor did not argue that Satz failed to opine whether [petitioner] actually premeditated and deliberated, an opinion clearly inadmissible under [California] Penal Code section 29, only that he failed to opine whether a person like the defendant could do so. This argument was not improper.

(Return, Exh. F at F434, citation omitted, emphasis in original).

This court must defer to the appellate court's determination that the prosecutor's "argument was not improper" under California law.[24/] Bains, 204 F.3d at 972. Accordingly, the court finds that petitioner has not stated a claim of prosecutorial misconduct on the basis of improper closing argument and that

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24. The appellate court additionally found that no claim of prosecutorial misconduct was stated because "[i]t is not reasonably probable that a different verdict would have been reached had the prosecutor not made the challenged statements during her closing argument," given that the jurors had been instructed to "'determine what facts have been proved from the evidence received in the trial and not from any other source' and that '[s]tatements made by the attorneys during the trial are not evidence.'" (Return, Exh. F at F434-F435, citations omitted). The provision of such instructions militate against a claim of fundamental unfairness arising from a prosecutor's closing arguments. See, e.g., Darden v. Wainwright, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 644, 94 S. Ct. 1868, 1872 (1974); Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000), cert. denied, ___ U.S. ___, 121 S. Ct . 1630 (2001).

claim should be dismissed with prejudice.[25/] See, e.g., United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) (a prosecutor may argue all reasonable inferences based on the evidence during closing argument); Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996) ("[c]ounsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom") (citation omitted), cert. denied, 522 U.S. 971, 118 S. Ct. 422 (1997).

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the petition with prejudice.

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25. A fair reading of petitioner's petition for review and habeas petition to the California Supreme Court shows that petitioner's alternative argument regarding the ineffectiveness of his counsel with respect to the expert testimony has not been presented to that court, rendering this alternative claim unexhausted. However, in the interest of judicial economy, the court will consider the claim pursuant to 28 U.S.C. § 2254(b)(2). Any such argument and/or evidence would have been largely cumulative to the evidence and testimony put on at trial regarding petitioner's mental health and his ability to premeditate and deliberate the crime. Counsel's failure to adduce cumulative evidence does not support a claim under Strickland. See Carriger, 971 F.2d at 332-34. Thus, as counsel already presented the evidence "in some form," petitioner has identified no "errors or omissions" by counsel sufficient to support an ineffective assistance claim in this respect. United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985), cert. denied, 502 U.S. 973, 112 S. Ct. 452 (1991).

DATED: June 28, 2001.

/S/
ANN I. JONES
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

APPENDIX F

COURT OF APPEAL - SECOND DIST.
FILED
MAR 31 1999
JOSEPH A. LANE Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDRE MIRZAYANCE, Defendant and Appellant.	B116856 (Super. Ct. No. BA122191)
In re ALEXANDRE MIRZAYANCE, on Habeas Corpus.	B124764

APPEAL from a judgment of the Superior Court of Los Angeles County. Candace J. Beason, Judge. Affirmed with petition denied.

Eric S. Multhaup and Charles M. Sevilla for Defendant and

Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Susan C. Diamond, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Alexandre Mirzayance appeals from the judgment entered following a jury trial which resulted in his conviction of the first degree murder of Melanie Ookhtens. He contends: he was denied effective assistance of counsel and due process as a result of his counsel's failure to timely request and the trial court's failure to give instructions regarding a lack of premeditation; the evidence was insufficient to support the finding of premeditation; he was denied effective assistance of counsel by his counsel's "misapprehension of the evidence and demonstrably unfounded argument to the jury"; the trial court erred in precluding a defense expert from describing the materials he relied upon in forming his opinions and in precluding that expert from testifying as to the effect of psychosis on deliberation; and he was deprived of due process by the trial court's acceptance of his not guilty by reason of insanity plea without adequate inquiry as to whether it was knowing, intelligent, and voluntary. In a petition for writ of habeas corpus which we have ordered heard concurrently with his appeal, defendant additionally contends: he was denied due process by spectator misconduct occurring at his trial; was denied due process as a result of his unknowing waiver of his not guilty by reason of insanity (NGI) plea; and was denied effective assistance of counsel. We affirm the judgment and deny the petition.

PROCEDURAL HISTORY

Defendant was charged in a one count information with first degree murder. (Pen. Code, § 187, subd. (a).) It was further alleged that he personally used a firearm (Pen. Code, §§ 1203.06, subd. (a)(l), 12022.5, subd. (a)) and that he personally used a deadly weapon (Pen. Code, § 12022, subd. (b)(1)). Defendant denied the charges and entered a plea of NGI. After the jury found defendant guilty of the murder and found true the firearm and deadly weapon allegations, defendant withdrew his NGI plea. He was sentenced to a total of 29 years to life in prison comprised of 25 years to life on the murder charge, plus four years for the firearm use. Sentence on the use of a deadly weapon charge was stayed.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206.) the evidence established that Melanie Ookhtens (Ookhtens) was defendant's cousin. At 4:30 p.m. on October 13, 1995, defendant was sitting in a chair in Ookhtens's parents' home when Ookhtens's grandmother, Nvart Ookhtens (Nvart), and aunt, Mary Choulakian (Mary) arrived. They brought gifts to welcome Ookhtens's parents, Flora and Murod Ookhtens (Flora and Murod), home from vacation. Defendant seemed surprised to see Nvart and Mary. He helped Nvart to put food in the refrigerator but would not allow her to arrange it. At trial, Nvart testified that defendant seemed different that day.

Mary left to buy some cards and when she returned, she laid three out on a table for Nvart to choose from. Defendant, however, was standing behind Nvart and Mary and reached between them and chose a card himself. Mary and Nvart left shortly thereafter.

In two tape-recorded statements to police, defendant stated that he was watching television at Ookhtens's parents' home when Ookhtens arrived there at 7 p.m. that evening. Ookhtens became angry when she saw defendant there watching

television. She told him that they had to pick up her parents at the airport, then went upstairs to her bedroom. Defendant waited about 40 seconds, then went to Ookhtens's room, knocked on her door and asked what she was doing. Ookhtens responded that she was getting dressed. Defendant complained that they were late and Ookhtens repeated that she was getting dressed.

When defendant started to enter Ookhtens's room, she told him to get out. He became angry, took a hunting knife from his pocket and entered the room. With the knife in his hand, defendant walked up to Ookhtens who was sitting on her bed. Ookhtens asked what he was doing with the knife and defendant stabbed her in the stomach and the neck. Ookhtens screamed at defendant to stop and hit him. Defendant threw the knife out the door and took a .25 caliber handgun from his pocket and shot Ookhtens once in the stomach and three times in the head from a distance of three feet. Defendant said he shot Ookhtens because she fought back. At about 7:20 p.m., the Ookhtens' neighbor, Gloria Stone, heard screaming and then gunshots from the Ookhtens home.

Ookhtens died as a result of three gunshot wounds to the head, including two to the right temple area and one to the top of the skull, one gunshot wound to the abdomen and nine stab wounds. The two gunshot wounds to the temple were consistent with defendant having stood over Ookhtens and shooting her in the head as she sat on the bed. The gunshot wound to the skull was consistent with defendant having stood over her and shooting her while she was laying on the ground. Any of the gunshot wounds would have been fatal. Two of the stab wounds were to Ookhtens's chest and would have been independently fatal.

Defendant took the knife and some of his clothes that were at the Ookhtens home and returned to his apartment in Pasadena. He took a shower and put the bloody clothes in a trash bag. At 8:07 p.m., defendant left a message on Ookhtens's parents' answering machine: "Melan, it's me. I'm sorry to call

you back late. I only want to say that I couldn't make it, I can't make it tonight because, well, Laurent called . . . well, I did not go out with him for a month, so he is like let's go out, because he works on weekends. So, go pick up your parents, say '[H]i' to them, drive carefully. But I'll call you guys tomorrow, like in the afternoon, try to see you, or whatever else happens, don't know. Okay? So bye-bye."

At about 8:15 p.m., defendant called Laurent Meira and asked Meira to meet him. Meira agreed and defendant picked Meira up outside Meira's Pasadena apartment at about 8:30 p.m. Defendant was quiet at first, then told Meira it was no good to be "high" and that he had "messed up big time." Defendant told Meira that he shot Ookhtens three times in the head and once in the stomach. Defendant stopped the car in front of a Burger King restaurant in Pasadena, took a white trash bag from the trunk and threw the bag into a trash container. Defendant got back into the car and started driving. Meira suggested that defendant drive to a police station. After thinking about it for a moment, defendant agreed. He stopped at a 7-Eleven Store to buy a drink, then drove to the Pasadena Police Station.

Defendant approached Sergeant Michael Korpal of the Pasadena Police Department at about 9:30 p.m. Defendant said, "I messed up tonight, I killed my cousin." Defendant told Korpal that he had smoked a couple of "hashish" cigarettes about one hour before the shooting, that he had an argument with his cousin, followed her upstairs to her bedroom and shot her. Korpal handcuffed defendant and took him and Meira into the station house.

After being advised of and waiving his constitutional rights, defendant told Korpal what had happened. He said he was angry at Ookhtens for hanging up on him the day before. In a consensual search of defendant's car, a hunting knife, a .25 caliber handgun and ammunition were retrieved. A .25 caliber shell casing was recovered from defendant's pocket. The trash bag defendant threw away was recovered and found to contain

defendant's clothing.

A urine sample given by defendant at 12:10 a.m. tested negative for the presence of marijuana and hashish. This result was inconsistent with defendant having smoked two hashish cigarettes seven hours earlier as he claimed.

Later that morning, defendant agreed to speak to Detective Robert Felix about the shooting. Defendant told Felix that he bought the gun about five or six weeks before the shooting and had been carrying it in his pocket for the three days before. Defendant said he did not know why he had done so. Defendant had the knife in his possession only that day. The day before he shot Ookhtens, defendant called her and asked what she was doing the next day. Ookhtens replied, "I can't really talk to you, I have to go. Bye." This angered defendant. Defendant told Felix he shot Ookhtens, "Because she was getting too much, was causing too much bad stuff on me when I did nothing; that's why. And for the fact I was on the drugs, I didn't think what I was doing."

On behalf of the defense, Dr. Paul Satz (Satz) testified that he was a clinical psychologist and neurologist and Chief of the Neuropsychology Practice at the Neuropsychiatric Institute at the UCLA School of Medicine. Satz examined defendant four times and conducted some 30 psychological tests on him. Satz opined that defendant was of subnormal intelligence with a "very substantial defect in executive functions" and in his ability to use his control functions. The frontal lobe of defendant's brain was damaged. Such damage would cause a person to misperceive what happened around them, to be unable to monitor their own behavior and to then retreat from social situations into a fantasy life.

Satz also reviewed defendant's school and medical records, interviewed his parents, Meira and defendant himself. Defendant's parents told Satz that defendant had experienced auditory hallucinations. They sought help for defendant when he was five years old because of the hallucinations. Defendant was also seen by a mental health professional when he was 13

to 14 years old. Defendant had a fascination with knives and guns, but refused to accompany his father on hunting trips because he was bothered by the sight of blood. Defendant's parents told Satz that defendant was delayed in nearly all of the developmental milestones during his first five years.

Defendant told Satz that his intelligence was subnormal and that he had been a failure from the beginning. He was unable to socialize with other people because it frightened him. Defendant said he had his first auditory hallucination when he was five years old. The voice spoke in French and sounded like a 30-year-old man. It told defendant to steal from his parents, to steal candy and to think bad thoughts, and defendant felt compelled to do what the voice said. He felt great pain if he refused to do what the voice told him to do and he never refused. Defendant said he did not know what he would do if the voice told him to kill his parents, it had never done so. Defendant heard the voice approximately three times a month throughout his childhood and adolescence.

Defendant also told Satz that he had difficulty in school and retreated into a fantasy world. He kept his hallucinations to himself because his parents and psychiatrists rejected the notion or told him the voices would go away. Defendant told Satz he was depressed, isolated, withdrawn, had been ridiculed, and once asked his father to contact Dr. Kervorkian to assist his suicide. When he was an early adolescent, defendant once taunted a peer with a knife, which led to increased alienation by his peers.

Defendant told Satz that he began to hallucinate and felt he was being threatened three days before he shot Ookhtens. The day before shooting Ookhtens, defendant was frightened when he saw spiders and a cat sitting on his stomach. Defendant went into his bedroom and put the knife and gun under his pillow for protection. Satz opined that defendant's belief he was being followed and carried the gun for protection raised the possibility of a paranoid delusional disorder. Meira told Satz that before defendant shot Ookhtens, defendant told Meira that he smoked

marijuana to make the voices go away. Satz testified that marijuana had a calming effect and was used by schizophrenics to self-medicate.

Satz opined that defendant probably suffered from psychosis most of his life and had a psychotic break at the time he killed Ookhtens. A person suffering from the disorders from which defendant suffered would not understand why they committed a murder.

The gist of defense counsel's closing argument was that defendant had no motive to kill Ookhtens, but killed her because of his mental disease. Thus, he argued, there could have been no deliberation or premeditation and defendant was guilty of no more than second degree murder.

DISCUSSION

Effective Assistance of Counsel

Defendant contends he was denied effective assistance of counsel as a result of his counsel's failure to request the jury be instructed with CALJIC No. 4.21 regarding intoxication and CALJIC No. 8.73 regarding provocation.[1/] He argues: "[T]here

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1. CALJIC Nos. 4.21 and 8.73 were revised in 1992, several years prior to defendant's trial. The parties, however, both refer to the 1988 versions. In pertinent part, these read as follows: CALJIC No. 4.21: "In the crime of ___ of which the defendant is accused . . . a necessary element is the existence in the state of mind of the defendant of the [specific intent to ___] [mental state[s] of ___]. [¶] If the evidence shows that defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether defendant had such [specific intent] [mental state]. [¶] If from all the evidence you have a reasonable doubt whether the defendant formed such [specific intent] [mental state], you must find that [he][she] did not have such [specific intent] [mental state[s]]."

were three evidentiary routes by which the jury could reach a second degree murder verdict: 1) provocation/sudden quarrel sufficient to raise a reasonable doubt as to deliberation but insufficient as to establish manslaughter (CALJIC No. 8.73); 2) intoxication from marijuana and hashish use (CALJIC No. 4.21); and 3) mental defect sufficient to raise a reasonable doubt as to premeditation/deliberation (CALJIC No. 4.21, modified)." With respect to CALJIC No. 4.21, defendant maintains that Satz's testimony concerning schizoaffective disorder and psychosis was sufficient to support the giving of a modified version of the instruction, replacing the word "intoxication" with the words "mental defect"; as was evidence of defendant's use of marijuana or hashish immediately before the shooting. With respect to CALJIC No. 8.73, he asserts that the evidence that a person with a paranoid schizophrenic disorder "becomes irrationally and uncontrollably provoked by what would be viewed as small and insignificant events, e.g., [Ookhtens] yelling at him for being late" supported such an instruction. Both contentions are without merit.

Under both the Sixth Amendment to the United States Constitution and article I of the California Constitution, a criminal defendant has a right "to 'the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.' [Citations.]" (*People* v. *Ledesma* (1987) 43 Cal.3d 171, 215.) A claim of ineffective assistance of counsel such as to require reversal of a conviction has two components. First, the defendant must show that counsel's representation was

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CALJIC No. 8.73 reads: "When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree."

deficient in that it "'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*Id.* at p. 216; *People* v. *Walker* (1993) 14 Cal.App.4th 1615, 1623-1624.) Second, the defendant must also establish prejudice before he or she can obtain relief on an ineffective assistance claim. (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 217; *People* v. *Walker, supra,* 14 Cal.App.4th at p. 1624.)

In determining whether counsel's performance was deficient, a reviewing court "must in general exercise deferential scrutiny." (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 216.) Unless there can be no satisfactory explanation for counsel's actions, where the appellate record sheds no light on why counsel acted or failed to act in the manner challenged, the case is generally affirmed on appeal. (See *People* v. *Ledesma, supra,* 43 Cal.3d at p. 218, quoting *People* v. *Pope* (1979) 23 Cal.3d 412, 426.) If trial counsel's challenged act or omission resulted from an informed tactical choice within a range of reasonable competence, the conviction must be affirmed. (*People* v. *Pope, supra,* 23 Cal.3d at p. 425; *People* v. *Walker, supra,* 14 Cal.App.4th at p. 1624.)

"Generally . . . prejudice must be affirmatively proved. . . . "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People* v. *Ledesma, supra,* 43 Cal.3d at pp. 217-218; see also *People* v. *Mayfield* (1993) 5 Cal.4th 142, 175.) "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] . . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687-695.) This reasonable probability must be shown by a preponderance of the evidence. (*People* v.

Ledesma, supra, 43 Cal.3d at 218.) "Preponderance of [the] evidence" means evidence that has more convincing force and the greater probability of truth than that opposed to it. (See *People* v. *Superior* Court (1971) 18 Cal.App.3d 316, 319, fn. 4.)

Here, defendant has not shown that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. This is because he has not shown that he was entitled to either of the instructions which he claims his counsel was ineffective for not requesting.

"CALJIC No. 8.73 is a 'pinpoint' instruction [citation] that relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory. [Citation.]" (*People* v. *Mayfield* (1997) 14 Cal.4th 668, 778.) The evidence of provocation warranting the instruction "must 'justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately . . . .'" (*People* v. *Fenenbock* (1996) 46 Cal.App.4th 1688, 1705.)

There was no such evidence in the case at bar. That Ookhtens may have been short with defendant does not establish provocation. (Cf. *People* v. *Rich* (1988) 45 Cal.3d 1036, 1112-1113 [evidence that rape victim resisted does not warrant giving of instruction regarding provocation].)

Defense counsel was also not ineffective for failing to request CALJIC No. 4.21. In *People* v. *Stress* (1988) 205 Cal.App.3d 1259, 1270, the court held that the mental process necessary for a finding of deliberation and premeditation is not "lacking when the considerations reflected upon by the defendant were the product of mental disease or defect." (*Id.* at pp. 1270-1271.) The modified version of CALJIC No. 4.21 defendant suggests should have been given would have incorrectly instructed the jury to the contrary. Further, the only evidence of intoxication was defendant's statement, contradicted by the physical evidence, that he had smoked hashish and that he killed Ookhtens because he was on drugs

and did not know what he was doing. Even assuming, arguendo, that such evidence would have been sufficient to warrant the giving of such an instruction had it been requested, this meager evidence of intoxication is not such that the failure to request the instruction constitutes ineffective assistance of counsel. The gist of the defense was mental illness, not intoxication, and it was not an unreasonable tactical decision to refrain from confusing the jury with less compelling theories.

Defendant's reliance on *People* v. *Castillo* (1997) 16 Cal.4th 1009 (*Castillo*) is misplaced. In that case, there was evidence that the defendant smoked PCP before the shootings and that it made him dizzy and affected his mental state. Defense counsel in *Castillo* requested and the trial court gave CALJIC No. 4.21. On appeal, the defendant complained that his trial counsel had been ineffective for not requesting that the instruction be modified to specifically tell the jury that it "should consider the intoxication evidence in deciding whether he *premeditated* the killing." (*Id.* at p. 1014, original italics.) The California Supreme Court rejected this claim, reasoning that "a reasonable jury would have understood deliberation and premeditation to be 'mental states' for which it should consider the evidence of intoxication . . . ." (*Id.* at p. 1016.) From this, defendant extrapolates the following: "If the presence of the version of CALJIC No. 4.21 provided the basis for the Supreme Court rejecting an ineffective assistance claim, then its absence must necessarily establish the basis for such a claim." (Emphasis in original.) Not so. Here, the evidence of intoxication and mental defect was far less than that present in *Castillo.* In fact, with evidence as sparse on this issue as it was in the case at bar, a reasonable defense attorney could make the strategic decision that to introduce this theory of defense would strain his or her credibility with the jury on other important issues and risk an adverse verdict on those issues. Accordingly, under the circumstances here present, it was not unreasonable for trial counsel to not request the instruction.

Trial Court Error to Give Prosecution's Pinpoint Instruction

Defendant contends he was denied due process and a fair trial as a result of the trial court giving "an instruction pinpointing its position in opposition to [defendant's] argument, while denying the defense a countervailing instruction adverting to the appropriateness of mental state evidence in determining the element of deliberation."[2/] He argues the instruction incorrectly implied "that evidence regarding lack of motive is irrelevant to the determination of deliberation" and that the defense was entitled to the instruction it requested. (Emphasis in original.) We disagree.

The theory of defense was that the absence of any motive for the killing coupled with the evidence of defendant's mental illness demonstrated the absence of premeditation or deliberation. The instruction given correctly informed the jury that motive was not an element of the offense but that it could be considered as a circumstance. "Absence of motive may tend to show the defendant is not guilty." (See, e.g., CALJIC No. 2.51.) Contrary to defendant's assertion, no juror could reasonably understand the challenged instruction to mean that evidence of motive is not relevant to the determination. With respect to the effect of mental disease or defect on the mental

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2. The People requested and obtained the following special instruction to the jury: "The mental process necessary for a finding of deliberation and premeditation is not dependent on the motivation for the act, nor is the necessary mental process lacking when the considerations reflected upon by the defendant were the product of mental disease or defect." Defendant's request for the following addition to that instruction was refused: "However, you should consider all of the defendant's mental processes at the time of the killing as you understand them to be in weighing and considering whether the defendant did in fact deliberate the commission of the crime."

process of a defendant, the instruction correctly informs the jury that the defense of "diminished capacity" is not available.

Nor do we find any error in the trial court's refusal to give a special instruction responsive to the one given at the People's behest. The defense instruction was redundant of other instructions already given.

Sufficiency of the Evidence

Defendant contends there was insufficient evidence of deliberation to support the verdict of first degree murder. He argues that there is no evidence that he contemplated killing Ookhtens "before the act itself." He argues further, "Even if the carrying a weapon presents some evidence supporting an inference of premeditation, i.e., contemplating a possible homicide beforehand, it does not simultaneously satisfy the requirement of proof of deliberation, i.e., the careful consideration of alternatives and consequences." (Emphasis in original.) We disagree.

In determining the sufficiency of the evidence, this court's role is a limited one. "Under the due process clauses of both the Fourteenth Amendment of the federal Constitution and article I, section 15 of the California Constitution, the test of whether evidence is sufficient to support a conviction is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.] In making this assessment the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts. [Citations.] [¶] The standard of appellate review is the same when the evidence of guilt is primarily circumstantial. 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the

appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]" (*People* v. *Holt* (1997) 15 Cal.4th 619, 667.) "'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.].' [Citation.]" (*People* v. *Ochoa, supra,* 6 Cal.4th at p. 1206; see also *People* v. *McLead* (1990) 225 Cal.App.3d 906, 917.)

Pursuant to Penal Code section 189: "All murder which is perpetrated . . . by any . . . kind of willful, deliberate, and premeditated killing . . . is murder of the first degree. . . . [¶] . . . . [¶] To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." Premeditation may be inferred from a variety of circumstances including, but not limited to, the defendant's conduct at the time of the killing. (See *People* v. *Theriot* (1967) 252 Cal.App.2d 222, 238.) In *People* v. *Anderson* (1968) 70 Cal.2d 15, the California Supreme Court identified three categories of evidence as pertinent to the determination of whether the evidence was sufficient to support a finding of premeditation: (1) planning activity; (2) motive; and (3) that the manner of killing was according to a preconceived plan. (*Id.* at pp. 26-27; see also *In re Sergio R.* (1991) 228 Cal.App.3d 588, 597, citing *People* v. *Lucero* (1988) 44 Cal.3d 1006, 1018-1020.) Typically, a verdict predicated upon a finding of premeditation and deliberation will be sustained when it is supported by some

evidence from all three categories, by extremely strong evidence of planning, by evidence of motive and planning, or by evidence of motive and manner of killing. (*People* v. *Anderson, supra,* 70 Cal.2d at p. 27.) This analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or "establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. [Citation.]" (*People* v. *Perez* (1992) 2 Cal.4th 1117, 1125.)

Planning can be inferred from evidence that the defendant obtained a weapon and used it upon the victim. (See, e.g., *People* v. *Miller* (1990) 50 Cal.3d 954, 993; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 792; *People* v. *Alcala* (1984) 36 Cal.3d 604, 626; *People* v. *Haskett* (1982) 30 Cal.3d 841, 850; *People* v. *Francisco* (1994) 22 Cal.App.4th 1180, 1192.) A manner of killing indicating that the defendant acted according to a preconceived design can be inferred from evidence that multiple shots were fired at close range (see, e.g., *People* v. *Thomas* (1992) 2 Cal.4th 489, 518; *People* v. *Francisco, supra,* 22 Cal.App.4th at p. 1192), from evidence that the defendant pursued the victim and fired multiple shots (*People* v. *Boyd* (1985) 38 Cal.3d 762, 770; *People* v. *Wells* (1988) 199 Cal.App.3d 535, 541) and from the absence of any provocation by the victim (*People* v. *Miller, supra,* 50 Cal.3d at p. 993; compare, e.g., *People* v. *Velasquez* (1980) 26 Cal.3d 425, 435 [sudden killing in the course of an argument and struggle does not constitute premeditated murder] with *People* v. *Boyd, supra*, 38 Cal.3d at pp. 769-770 [only evidence of argument or struggle consisted of the victim pushing the weapon away].) In *People* v. *Hawkins* (1995) 10 Cal.4th 920, the court affirmed a conviction of first degree murder based on evidence that the victim was shot twice, once in the back of the head near the base of the skull and once in the back of the neck. The trajectory of the bullets suggested that the gun was somewhere above the victim's head. The court held,

"[A]lthough evidence of planning and motive was indeed minimal if not totally absent in the present case, we conclude that the manner-of-killing evidence was sufficiently strong to permit a trier of fact to conclude beyond a reasonable doubt that the defendant committed the . . . murder with premeditation and deliberation." (*Id.* at p. 957.)

Here, there was evidence that defendant obtained a gun and carried it with him for several days before using it to shoot Ookhtens and that he began carrying a knife on the day of the killing. Moreover, the evidence established that he stabbed Ookhtens multiple times and shot her at close range. This evidence of planning and manner-of-killing was sufficient to permit the trier of fact to conclude beyond a reasonable doubt that defendant killed Ookhtens with premeditation and deliberation.

Due Process

Defendant contends he "was deprived of due process and a fair presentation of his mental state defense by a combination of ineffective assistance of counsel, prosecutorial misconduct, and judicial error regarding Dr. Satz's testimony." He argues that (1) trial counsel was ineffective for failing to prepare Satz to testify regarding premeditation and deliberation, and for not objecting to the prosecutor's criticism of Satz for failing to testify as to defendant's diminished capacity; (2) the prosecutor's criticism of Satz constituted misconduct inasmuch as Penal Code section 29 prohibits any such testimony; and (3) the trial court erred in refusing to read the premeditation and deliberation instruction to the jury during Satz's testimony. We find no error.

The defense of diminished capacity has been statutorily abolished. (Pen. Code, § 28, subd. (b); *In re Christian S.* (1994) 7 Cal.4th 768, 789-790.) "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not

limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. . . ." (Pen. Code, § 28, subd. (a).) Such evidence is, however, "admissible solely on the issue of whether or not the accused actually . . . premeditated, deliberated, or harbored malice aforethought . . . ." (Pen. Code, § 28, subd. (a).) Notwithstanding the admissibility of such evidence, "any expert testifying about a defendant's mental illness, mental disorder, or mental defect *shall not testify as to whether the defendant had or did not have the required mental states,* which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Pen. Code, § 29, italics added.) "The apparent meaning of the statutory language is that evidence of mental problems is inadmissible to show that a defendant lacked the capacity to form the requisite mental state, but is admissible to show that the defendant actually lacked the requisite mental state. An expert may testify regarding the defendant's mental condition so long as the expert gives no opinion on the ultimate question of whether or not the defendant actually had the requisite mental state." (*California* v. *Molina* (1988) 202 Cal.App.3d 1168, 1173, emphasis omitted; see also *People* v. *Aris* (1989) 215 Cal.App.3d 1178, 1198 [error to preclude expert from testifying "as to how the defendant's particular experiences as a battered woman affected her perceptions of danger, its imminence, and what actions were necessary to protect herself"], 1200-1201 [error found harmless because not reasonably probable a different verdict would have been reached absent error] disapproved of on another point in *People* v. *Humphrey* (1996) 13 Cal.4th 1073, 1086; *People* v. *Whitler* (1985) 171 Cal.App.3d 337, 341-342 [psychiatric testimony admissible to show defendant's mental condition actually prevented him from forming requisite state of mind]; *People* v. *Jackson* (1984) 152 Cal.App.3d 961, 969-970 [Pen. Code, § 29 did not preclude testimony describing defendant's

mental illness and its effect on his conduct].) Penal Code sections 28 and 29 do not bar a defendant "from presenting expert testimony relating to defendant's mental disorders at the time of the commission of the crimes, or a correlation of the evidence of the crimes to the experts' test results (short of an opinion that as a result of defendant's mental disorders he lacked the capacity to form the intent to kill, or did not in fact have the intent to kill, when committing the crimes). [Citations.]" (*People* v. *Samoya* (1997) 15 Cal.4th 795, 837.) The prosecutor may comment upon and argue the failure of a defense expert to consider otherwise admissible evidence of the defendant's mental condition relevant to the expert's diagnosis. (*Ibid.*)

First, we find no ineffective assistance of counsel. As we have already discussed, to obtain relief on an ineffective assistance claim, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and (2) prejudice. (*People* v. *Walker, supra,* 14 Cal.App.4th at pp. 1623-1624.) We exercise deferential scrutiny of trial counsel's performance and unless there can be no satisfactory explanation for counsel's actions, where the appellate record sheds no light on why counsel acted or failed to act in the manner challenged, the case is generally affirmed on appeal. (See *People* v. *Ledesma, supra,* 43 Cal.3d at p. 218, quoting *People* v. *Pope, supra,* 23 Cal.3d at p. 426.) If trial counsel's challenged act or omission resulted from an informed tactical choice within a range of reasonable competence, the conviction must be affirmed. (*People* v. *Pope, supra,* 23 Cal.3d at p. 425; *People* v. *Walker, supra,* 14 Cal.App.4th at p. 1624.)

"It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. . . . [¶] . . . . [¶] The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland* v. *Washington, supra,* 466 U.S. at pp. 687-695.)

Here, the only disputed issue in the case was whether defendant premeditated and deliberated the killing. Prior to his testimony and pursuant to Penal Code section 29, the trial court admonished Dr. Satz as follows: "[Y]ou can talk about any testing you gave. You can give general impressions. [¶] You cannot testify, however, specifically as to whether [defendant] premeditated in this situation, or formed a specific intent in this situation."

Satz testified that he was referred to defendant by defense counsel "to see if [Satz] could shed any light on this who this [defendant] was." Over four days, he gave defendant about 30 standardized psychological tests. Satz found defendant had subnormal intelligence, language and memory difficulties, and a substantial defect in "his ability to look at a situation, to think about things, to read a situation correctly, to entertain alternative hypotheses, to switch and adapt mental state to the requirements of the task. To think in the abstract form. [¶] . . . [H]e had a fundamental defect in his ability to use his control functions. There was no evaluator, or self monitor." Satz opined that defendant had a structural defect of the brain which would cause him to misperceive situations and, eventually, retreat into a fantasy life. Satz also found defendant to be suffering from "some form of schizophrenic disorder starting very early in life . . . and that it was enduring and continued apparently throughout childhood and adolescence into the time of the assault." There was evidence that defendant experienced auditory hallucinations beginning at the age of five, and had a fascination with knives and guns. Satz's review of defendant's school records, interviews with defendant and his friends and family were consistent with this conclusion.

With respect to the killing, Satz opined that a person with the "nature of illness that [defendant] has can know that he has a knife, know that he has a gun, know that he has become angry, go upstairs with the knife and the gun and being angry stab somebody knowing he did that, shoot somebody and not know why he did it[.]" Satz further opined that defendant was "most

probably" angry and impulsive at the time. According to Satz, it is very likely that "someone who suffers with the symptoms of the illness [from which defendant suffered], and having a good relationship with another person, [could] impulsively kill [that person] as a result of that illness[.]" Satz opined that defendant "was probably psychotic most of his life." Satz defined a psychosis as "a temporary breakdown in reality testing to the point where the person loses the capacity oftentimes to control their impulses . . . ." A psychotic break, Satz explained, is "associated with corresponding changes in metabolic brain function at the time of the event. It is a breakdown in reality testing and control functions."

On cross-examination, Satz defined premeditation and deliberation as "planned intent." Defense counsel objected to further questioning Satz about his knowledge of the legal definition of those terms. The prosecutor maintained she had "a right to ask about [Satz's] legal understanding of what premeditation and deliberation is. . . . If [Satz] doesn't even understand what the legal definitions are then how relevant are his opinions about whether or not a person of [defendant's] condition . . . can premeditate and deliberate." The trial court overruled the objection and refused defense counsel's request that the CALJIC instruction defining those terms be read at that time.[3/] Whereupon, the prosecutor elicited Satz's testimony

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3. CALJIC No. 8.20, which was given in this case, provides in pertinent part as follows: "The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an

that, with respect to a murder charge, premeditation and deliberation is "whether the person has a plan or deliberates or plans, has a set operation in order to commit a certain offense, that they spend time planning on it, thinking about it in order to carry it out . . . that it is not a sudden uncontrolled outburst." Satz further testified that, to constitute premeditation and deliberation, the individual had to think about his or her conduct for "a sustained period of time" "more than a few minutes." Satz opined that defendant "does contemplate and evaluate and make judgments, but because of his problem solving method, he sometimes makes errors in judgment."

During closing, the prosecutor argued: "With respect to the issue of premeditation and deliberation, the doctor never gave an opinion as to whether or not a person like the defendant could premeditate and deliberate. His only opinion was that the defendant has a brain impairment which affects his ability to think and affects his ability to control his impulses. [¶] [DEFENSE COUNSEL]: If I might approach. [¶] THE COURT: No. [¶] [THE PROSECUTOR]: He did give an opinion that someone with those types of problems, including his mental illness would act impulsively under the circumstances. What I asked Dr. Satz, though, was, well, under certain circumstances can the defendant plan? He can plan to go to school. He can plan to come to the United States for that school. He can plan to go to school. He can plan to go to his cousin's for the weekend. He can certainly make plans."

First, we note that the prosecutor did *not* argue that Satz failed to opine whether the defendant actually premeditated and deliberated, an opinion clearly inadmissible under Penal Code section 29, only that he failed to opine whether a person *like* the

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unlawful killing as murder of the first degree. [¶] To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill."

defendant *could* do so. This argument was not improper. (Cf. *People* v. *Whitler, supra,* 171 Cal.App.3d at pp. 341-342 [psychiatric testimony admissible to show defendant's mental condition actually prevented him from forming requisite state of mind].)

Even assuming, arguendo, that this evidence would have been inadmissible under Penal Code section 28, it is not clear that defense counsel failed to object to the prosecutor's argument. In fact, it appears that he requested but was denied a bench conference. We need not decide whether further objection or request for admonition would have been futile in this case. (See, e.g., *People* v. Hill (1998) 17 Cal.4th 800, 820-821 [no necessity to make timely objection and/or request for admonition if either would be futile].) This is because, apart from whether the failure to object demonstrated representation falling below an objective standard of reasonableness under prevailing professional norms, defendant has failed to demonstrate prejudice.

The jurors were instructed that their duty was to "determine what facts have been proved from the evidence received in the trial and not from any other source" (CALJIC No. 1.00) and that "[s]tatements made by the attorneys during the trial are not evidence." (CALJIC No. 1.02.) We assume the jury understood and followed these instructions. (*People* v. *Holt, supra,* 15 Cal.4th at p. 662 [Jurors are presumed to understand and follow court's instructions.].) It is not reasonably probable that a different verdict would have been reached had the prosecutor not made the challenged statements during her closing argument.

For the same reasons, defendant's claim of prosecutorial misconduct must fail. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *People* v. *Hill, supra,* 17 Cal.4th at p. 823, fn. 1 [prosecutor's conduct judged by an objective standard; "When, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury

construed or applied any of the complained-of remarks in an objectionable fashion"].)

Nor do we find any ineffective assistance of counsel as a result of trial counsel's failure to prepare Satz to testify regarding premeditation and deliberation, or any error by the trial court in refusing to read the legal definition of those terms to the jury during Satz's testimony. Satz testified extensively as to defendant's mental condition, including his ability to make considered decisions. Knowing the legal definition of these terms would not have changed Satz's evaluation of defendant's mental state at the time of the killing.

Ineffective Assistance

Defendant contends he was deprived of the effective assistance of counsel by his trial counsel's "misapprehension of the evidence and demonstrably unfounded argument to the jury." He argues that defense counsel mistakenly referred in closing argument to the fact that defendant brought a suitcase to Ookhtens's home to stay for the weekend as militating against premeditation and deliberation, when there was no evidence introduced that defendant had brought a suitcase with him that weekend. "This mistake must necessarily have embarrassed and undermined the defense in the jury's eyes, much as Dr. Satz was unfairly embarrassed and impeached by the debacle regarding premeditation and deliberation." We disagree.

First, we note that defense counsel's argument presented a reasonable inference from the ambiguous evidence presented that defendant had been staying with Ookhtens on weekends. Even assuming the argument was not supported by the evidence, however, defendant has failed to show any prejudice. It is not reasonably probable that, had defense counsel failed to make the argument, a different verdict would have been reached.

Restrictions on Satz's Testimony

Defendant contends the trial court erred in "precluding Dr. Satz from describing the contents of materials he relied on in forming his opinion; in refusing to permit Dr. Satz to explain his answers on cross-examination; and in precluding Dr. Satz from testifying as to the effect of psychosis on deliberation." We find the errors to have been harmless.

Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears or record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination." (See also *People* v. *Hansel* (1992) 1 Cal.4th 1211, 1223.) "A miscarriage of justice should be declared only when the reviewing court is convinced after an examination of the entire case, including the evidence, that it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.] Prejudice from error is never presumed but must be affirmatively demonstrated by the appellant. [Citations.]" (*Brokopp* v. *Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854; cf. *People* v. *Champion* (1995) 9 Cal.4th 879, 919 [no reasonable probability outcome of trial would have been different if challenged evidence had been excluded].)

Here, defendant has failed to demonstrate a reasonable probability that the outcome of the trial would have been different if Satz had been allowed to testify as to the content of defendant's past psychological records which Satz reviewed, the fact that one of defendant's teachers had reported aggressive acts by defendant when defendant was an adolescent, or Meira's

report that defendant had told Meira that defendant had been the victim of three thefts.

Defendant's reliance on *People* v. *Wetmore* (1978) 22 Cal.3d 318, 320-321, for the proposition that he was entitled to have Satz's testimony regarding defendant's sanity "presented for its impact on the guilt phase mental state issues," is misplaced. The holding of that case has been superseded by the enactment of Penal Code sections 25, 28 and 29. (*People* v. *Saille* (1991) 54 Cal.3d 1103.)

Withdrawal of Not Guilty by Reason of Insanity Plea

Defendant contends on appeal and in his petition for writ of habeas corpus that he was deprived of due process "by the trial court's acceptance of the NGI plea withdrawal without adequate inquiry whether it was knowing, intelligent, and voluntary." He argues that there was no explanation for "this highly unexpected turn of events which had no conceivable benefit to [defendant]" and that "the combination of [defendant's] multiple mental disabilities, the numbing and confusing effects of the psychotropic drugs, and his ignorance of their combined impact on his mental functioning rendered the perfunctory and cursory waiver process constitutionally invalid. The bottom line here is that the trial court had a duty to probe past the perfunctory to determine whether [defendant] had an actual understanding of the rights available to him and the consequences of the withdrawal." In his petition for habeas corpus, defendant argues his waiver "was involuntary and not freely and intelligently made in [that] he was indisputably psychotic at the time and taking heavy doses of anti-psychotic and anti-depressant medication, and there was expert testimony before the court that due to his mental illness, he could not make rational choices between given options." We disagree.

In *People* v. *Redmond* (1971) 16 Cal.App.3d 931 (*Redmond*), the defendant entered pleas of not guilty and NGI to the charge of an assault with a deadly weapon and by means

of a force likely to produce great bodily injury. When the jury convicted him of the lesser crime of simple assault, the defendant moved for a withdrawal of his NGI plea "to accept criminal punishment consisting of a county jail sentence, which at most was six months, rather than an indefinite noncriminal commitment to a mental hospital." (*Id.* at pp. 934-935, fn. omitted.) The trial court denied the motion "in view of what it considered 'overwhelming' evidence before it that defendant was insane when he committed the offense." (*Id.* at p. 933.) Defendant was thereafter found insane and committed to the state hospital. (*Ibid.*) The appellate court reversed the order of commitment and directed the trial court to set aside the insanity verdict and to reconsider the motion to withdraw the NGI plea. It outlined the appropriate procedure to be followed: "(1) The trial court should reassure itself that a defendant at the time he seeks to withdraw his insanity plea is presently sane, i.e., that he is capable of understanding the nature and purpose of the proceedings against him, that he comprehends his own status and condition with reference to such proceedings, and that he is able to assist his attorney in the conduct of his defense. [Citations.] (2) If defendant is found to be presently insane, the solution is obvious. (Pen. Code, §§ 1370, 1367.) (3) If defendant is found to be presently sane, then a series of questions should be propounded to such defendant and to his counsel and the answers thereto be made part of record to meet requirements of *Boykin* v. *Alabama* (1969) 395 U.S. 238 []; *In re Tahl* (1969) 1 Cal.3d 122 []; and *People* v. *West* (1970) 3 Cal.3d 595 [], insofar as they might be applicable to the situation presented. (4) If the court be satisfied that such defendant is making a free and voluntary choice with adequate comprehension of the consequences, then withdrawal of the plea should be permitted." (*Id.* at p. 938.) The court in *Redmond* continued, "What we state in this opinion, of course, is not intended to apply to situations where there is no doubt of a defendant's sanity in the mind of the trial court and the reports of the examining psychiatrists unanimously indicate that such

defendant was sane at the time of the offense. Free withdrawal of the insanity plea under such circumstances should be permitted as it has been in the past." (*Id.* at p. 939.) "The procedures set forth in *Redmond* are not necessitated by the withdrawal of an insanity plea alone, but rather of the withdrawal of the plea by a defendant whose present sanity is doubted." (*People* v. *Huffman* (1977) 71 Cal.App.3d 63, 81; see also *People* v. *Bloom* (1989) 48 Cal.3d 1194, 1214 [free withdrawal of the insanity plea should be permitted where there is no doubt of the defendant's sanity in the mind of the trial court].) An expert's testimony concerning the defendant's personality disorder is insufficient, as a matter of law, to raise a doubt regarding defendant's sanity. (*People* v. *Bloom, supra,* 48 Cal.3d at p. 1214.)[4/]

Here, following the verdict of first degree murder, defense counsel stated: "In view of the finding by the jury of first degree murder, we have gone through the following process: [¶] I understand that I have a right to ask this court to empanel a new jury to consider the question. I believe I do not have such grounds to make such a motion, other than the fact that it is my

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4. In *Bloom*, the defendant was charged with the first degree murders of his father, step-mother and step-sister. As to the murder of his step-sister only, the defendant had entered a NGI plea. After the jury convicted him of all three murders, the defendant withdrew his NGI plea and represented himself in the penalty phase of his trial. The jury returned a verdict of death. Following an "incident of violence" in jail, a hearing was held to determine the defendant's competence; he was found competent and represented himself in sentence modification proceedings. (*People* v. *Bloom, supra,* 48 Cal.3d at pp. 1202-1203.) On appeal, the defendant complained that the trial court failed to "expressly advise him regarding the constitutional rights he would be foregoing by withdrawing his plea, including the privileged against self-incrimination and the rights to jury trial and confrontation." (*Id.* at p. 1214.)

firm belief that this jury based on their finding will not find the defendant insane on the basis of the evidence that I can present in this case in the form of psychiatric, psychological and other testimony I have available to me. [¶] I've had a discussion with the defendant about his rights in this regard, and he is willing to, at my suggestion, and after careful consideration, I think on his part, waive and give up his right to continue his plea of not guilty by reason of insanity and to withdraw that plea at this time. [¶] May I take the waiver from him, unless the court wishes? [¶] THE COURT: No. You may go ahead. I may have some additional questions. [¶] [DEFENSE COUNSEL]: [Defendant], do you understand you have a plea entered previously of not guilty by reason of insanity. [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: Do you understand that the jury that heard this case now has an opportunity to determine from the evidence we are going to present and from the evidence presently presented in the trial -- [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: -- Whether or not you were insane at the time of commission of the crime. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: We would have the duty of proving that by the preponderance of the evidence. If we were successful and the jury found you to be insane, you would be placed in the mental health system, and then the mental health system would determine if and when you were ever to be released; [¶] and you have a right to come back to court and have a jury again determine whether you were safe to be in the community; [¶] and while in the mental health system, you could be placed in various institutions and perhaps even on an outpatient basis. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: When you withdraw your plea of not guilty by reason of insanity, there will be no trial by a jury, there will be no trial by a court to determine whether or not you were sane or insane at the time of the commission of this offense. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And do you

understand, therefore, that the question of your insanity will not be considered, and you will be presumed to be sane at the time of the crime. [¶] THE DEFENDANT: Yes. [¶] THE COURT: By withdrawing the plea, you will be sentenced into the criminal justice system, which means you will be sentenced to the adult authority for a term of imprisonment to be set by the court. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: The court will sentence you, as a matter of law, to 25 years to life, and some additional time not to exceed, I think seven years, on the enhancements, which the court will decide at the time and place of your sentence after hearing all arguments on that. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] THE COURT: Ms. [Prosecutor]? [¶] [THE PROSECUTOR]: I would indicate that the enhancements are up to ten years. [¶] [DEFENSE COUNSEL]: Sorry. Up to ten years. So that the maximum term you could be sentenced to in the criminal justice system is 35 years to life. [¶] Do you understand that? [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: In view of all these factors, and knowing your rights, do you waive and give up your right to continue with your previously entered plea of innocent and therefore withdraw your plea of not guilty by reason of insanity? [¶] THE DEFENDANT: Yes. [¶] [DEFENSE COUNSEL]: Do you have any questions on anything we have discussed in that regard? [¶] THE DEFENDANT: No questions. [¶] THE COURT: Ms. [Prosecutor], is there any further inquiry by the People? [¶] [THE PROSECUTOR]: No, Your Honor. [¶] THE COURT: All right. [¶] [Defendant], right now you are on a variety of psychiatric medications. Do you feel that right now you are mentally and emotionally able to make that kind of decision? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And what medications are you on currently? [¶] THE DEFENDANT: Four different ones. Zoloft, Cogentin, Navane and Vistaril. [¶] THE COURT: Did you have your dosage yesterday? [¶] THE DEFENDANT: Yes. [¶] THE COURT: And how about today?

[¶] THE DEFENDANT: Yes. [¶] THE COURT: [Defense counsel], you've indicated that you have spoken with your client about the withdrawal of the not guilty by reason of insanity plea. Would you concur in his withdrawing that plea? [¶] [DEFENSE COUNSEL]: Yes. And it is my recommendation also. [¶] THE COURT: [Defense co-counsel], do you have any objection, or do you concur? [¶] [DEFENSE CO-COUNSEL]: I also concur. [¶] THE COURT: At this time, the court allows the withdrawal of the NGI plea."

We find no denial of due process in the acceptance of defendant's withdrawal of his NGI plea. The record reflects that the trial court reassured itself that defendant was "capable of understanding the nature and purpose of the proceedings against him, that he comprehends his own status and condition with reference to such proceedings, and that he [was] able to assist his attorney in the conduct of his defense." (*People* v. *Redmond, supra,* 16 Cal.App.3d at p. 938.) We are not persuaded otherwise by the averments of Satz and various other doctors who examined defendant.

Spectator Misconduct

In his petition for writ of habeas corpus, defendant contends he was denied due process and an unbiased jury as a result of the conduct of the victim's family and supporters. He argues they packed the courtroom and adjacent hallways and made their presence and hatred for defendant known to the jury through "clothing, yellow ribbons, courtroom outbursts of weeping, groaning, facial grimaces, and verbal attacks on [defendant's] family and attorneys." He argues further that the spectators "audibly gestured and guffawed at [Satz's] testimony in full view and hearing of the jury." We find no merit in this contention. Defendant points to nothing in the record which would indicate he brought this alleged misconduct to the attention of the trial court so that it could eject from the courtroom any person or persons creating a disturbance or

otherwise threatening the fairness of the proceedings, nor that he requested any admonition to the jury to ignore the alleged misconduct. Under these circumstances, we find no denial of due process.

Ineffective Assistance of Counsel

As he did on appeal, defendant contends in his petition for habeas corpus that he was deprived of due process by the ineffective assistance of his trial counsel. He argues that trial counsel erred in not showing the jury that defendant was not building up anger toward Ookhtens the week before the killing, erred in conceding second degree murder when a viable defense of manslaughter existed, erred in presenting "a token mental state defense to the deliberation element of first degree murder when a wealth of other exculpatory evidence was available," erred in not producing other evidence to refute the prosecution's case, erred in failing to investigate the case. We find no merit in this contention.

Apart from whether trial counsel's representation "'fell below an objective standard of reasonableness . . . under prevailing professional norms'" (*People* v. *Ledesma, supra,* 43 Cal.3d at p. 216), which we do not find, defendant has failed to establish prejudice. We find there to be no reasonable probability that, but for counsel's alleged errors, a different verdict would have been reached. (*Id.* at pp. 217-218.) None of the exculpatory evidence defendant recites, including evidence of his mental disorder, was reasonably likely to persuade a jury that defendant did not premeditate and deliberate the killing.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GODOY PEREZ, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

COURT OF APPEAL - SECOND DIST.
FILED
APR 9 1999
JOSEPH A. LANE Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDRE MIRZAYANCE, Defendant and Appellant.	B116856 (Super. Ct. No. BA122191) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]
In re ALEXANDRE MIRZAYANCE, on Habeas Corpus.	B124764

THE COURT:

IT IS HEREBY ORDERED that the opinion filed in the above matter on March 31, 1999, is hereby modified as follows:

Page 2, dele[illegible]rst paragraph in its entirety and substitute the following in [illegible]tead:

Defendant and appellant Alexandre Mirzayance appeals from the judgment entered following a jury trial which resulted in his conviction of the first degree murder of Melanie Ookhtens. He contends: he was denied effective assistance of counsel and due process as a result of his counsel's failure to timely request and the trial court's failure to give instructions regarding a lack of premeditation; the evidence was insufficient to support the finding of premeditation; he was denied effective assistance of counsel by his counsel's "misapprehension of the evidence and demonstrably unfounded argument to the jury"; the trial court erred in precluding a defense expert from describing the materials he relied upon in forming his opinions and in precluding that expert from testifying as to the effect of psychosis on deliberation; and he was deprived of due process by the trial court's acceptance of his withdrawal of his not guilty by reason of insanity (NGI) plea without adequate inquiry as to whether such withdrawal was knowing, intelligent, and voluntary. In a petition for writ of habeas corpus which we have ordered heard concurrently with his appeal, defendant additionally contends: he was denied due process by spectator misconduct occurring at this trial; was denied due process as a result of his unknowing waiver of his NGI plea; and was denied effective assistance of counsel. We affirm the judgment and deny the petition.

[end of modification]

There is no change in the judgment.

GODOY PEREZ, J. GRIGNON, ACT. P.J. ARMSTRONG, J.

APPENDIX G

SUPREME COURT
FILED
JUL 14 1999
Robert Wandruff Clerk

Deputy

Second Appellate District, Division Five,
No. B116856/B124764
S078671

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

ALEXANDRE MIRZAYANCE, Appellant
IN RE ALEXANDRE MIRZAYANCE ON HABEAS CORPUS

Appellant's petition for review DENIED.

GEORGE
Chief Justice

APPENDIX H

SUPREME COURT
FILED
DEC 1- 1999
Robert Wandruff Clerk

Deputy

S078812

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

In Re ALEXANDRE MIRZAYANCE On Habeas Corpus

Petition for writ of habeas corpus DENIED.

Mosk, J., is of the opinion an order to show cause should issue.

GEORGE
Chief Justice

FILED
OCT 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-396

In the Supreme Court of the United States

Michael Knowles, Warden, California Department of Corrections and Rehabilitation,

Petitioner

v.

Alex Mirzayance,

Respondent

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

---

Brief in Opposition

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether there is any issue of law created in the Ninth Circuit's unpublished opinion finding that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), for a last minute withdrawal of respondent's already prepared, credible, and sole defense surrendered for no countervailing benefit?

2. Whether AEDPA's deferential review standard was properly applied after the state courts did not address the issue squarely presented it, and where the two separate Circuit panels that reviewed the case applied the 28 U.S.C. § 2254(d) standard whether the state court's unexplained denial of the claim was unreasonable in light of this Court's precedent?

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[1] Under Rule 15.2, respondent's Brief in Opposition is to argue misstatements of law in the petition or deficiencies "based on what occurred in the proceedings below."

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STATEMENT OF THE CASE

Respondent Alex Mirzayance filed a habeas petition in the Central District of California challenging his state conviction for the murder of his cousin, Melanie Ookhtens. He asserted that his trial counsel provided ineffective assistance of counsel in advising him to waive his only defense, not guilty by reason of insanity (NGI), on the morning the NGI trial was to commence. The defense, which the federal courts found credible, was surrendered for no benefit to respondent whatsoever.

Respondent asserted that counsel had no rational tactical reason for withdrawing the insanity defense, nor could a valid tactical reason exist given that the NGI defense was respondent's only defense and was ready for trial.

Despite vigorously pressing the incompetency of counsel claim in the California appellate courts, neither the Court of Appeal nor the California Supreme Court addressed it in denying relief. Two separate Ninth Circuit panels agreed that the insanity defense appeared strong with the first remanding for an evidentiary hearing on why trial counsel decided to waive respondent's only defense on the morning the insanity trial was to commence. Quoting from U.S. v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996), that first panel wrote: "We have a hard time seeing what kind of strategy, save an ineffective one, could lead a lawyer to deliberately omit his client's only defense, a defense that had a strong likelihood of success, and a defense he specifically

stated he had every intention of presenting." Petitioner's Appendix [hereafter "PA"] D-73,74.

At the evidentiary hearing, defense counsel confirmed that there was no benefit whatever for respondent from withdrawing the NGI defense. Respondent also proved the bona fides of the NGI defense through the testimony of three experienced forensic psychiatrists and two psychologists. They testified that respondent, due to a long standing serious mental disease, met the California legal definition of insanity and affirmed that they were prepared to so testify at the NGI trial. The Magistrate-Judge's Report & Recommendation [R&R], adopted by the district court, found that these and other "witnesses could have testified credibly and therefore perhaps successfully." PA C-68. On appeal, the Ninth Circuit panel agreed that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), and affirmed the district court grant of relief. PA B-6.

STATEMENT OF FACTS[2]

On October 13, 1995, Melanie Ookhtens was a

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[2] Petitioner fails to recite the facts supportive of the panel decision that trial counsel was ineffective in abandoning the insanity defense, respondent's only defense. Respondent thus supplements the factual recitation with the facts explaining the basis for the relief granted by the courts below. Cites to "RT" are to the federal evidentiary hearing. "Trial RT" refers to the state trial proceedings which were exhibits in the federal district court hearing. "MER" stands for the respondent's excerpts of record in the Ninth Circuit.

college student at the University of Southern California. Her parents were out of the country on vacation and she and respondent, her younger cousin, planned to pick them up at the airport that night. That afternoon, Melanie's grandmother and aunt went to Melanie's residence to prepare the house for the parent's return. Respondent had already arrived to meet Melanie. As a family relation, he had ready access to the home.

When the grandmother and her daughter opened the front door, respondent seemed "startled," "[m]aybe he was expecting Melanie, and when he saw us, he got confused." Trial RT 96. The grandmother described respondent as "following me wherever I was going with the strange walking." Trial RT 97. She found that respondent was acting very "manly" which was "extremely" abnormal for him, id. at 92, as respondent normally was a "quiet, shy person." Id. at 95. The grandmother testified respondent's relationship with Melanie was very close, like "sister and brother." Trial RT 94.

Respondent's trial attorney, Mr. Wager, testified that his strategies for the guilt trial were to call Dr. Paul Satz, a psychologist, as the sole expert witness at the guilt trial. Dr. Satz conducted thirty psychological and neuropsycho-logical tests, thirteen of which focused on respondent's frontal lobe brain damage, and nine showed evidence of such impairment. Dr. Satz testified he found significant brain damage, "of a congenital form, long-standing, enduring

structural defect of the nervous system, of the brain." Trial RT 467.

Other lay witnesses supported the mental defense. One was respondent's friend, Laurent Meira, who testified at the guilt trial that on the Friday evening of the homicide, respondent picked him up outside his condominium in Pasadena at approximately 8:30 p.m., and "seemed pretty anxious, pretty excited . . . agitated." Trial RT 117. Respondent told him he had shot his cousin in the head and stomach. Trial RT 120-121. Meira suggested that respondent go to the police station and he agreed. Trial RT 123. Respondent stated to Meira he had been carrying his gun since Wednesday because he "felt pretty bad," "that he was followed," and that "someone was after him." Trial RT 149-150.

Respondent's trial attorney, Don Wager, testified at the district court evidentiary hearing that an insanity verdict was "what we were really driving for more than anything else," RT 50, and that he felt he had to obtain a second-degree murder verdict at the guilt trial or the prospect of a subsequent verdict of insanity was virtually hopeless. However, he chose to withhold from the guilt phase every one of the psychiatrists who found respondent did not harbor premeditation and deliberation at the time of the homicide. RT 50. Wager viewed Dr. Satz's cross-examination an "absolute disaster," RT 49, because he performed "terribly," RT 89, but he took no remedial action

such as simply calling one or more of the other more experienced forensic psychiatrists to testify at the guilt phase trial.

Wager testified he abandoned the insanity defense because Mirzayance's parents refused to testify on the morning the insanity trial was to begin. RT 57. Mirzayance's parents denied they refused to testify, RT 174, 295, and their family attorney, James Lund, testified that on the morning of trial Wager did not tell him the parents refused to testify. Rather, Wager told him (that in Wager's opinion) the parents were in "too much pain" or "anguish" to testify. RT 281. (The magistrate judge found that "[w]hile it therefore may be accurate in a precise, semantic sense to say that the parents never *refused* to testify, the Court finds that the parents at least expressed clear *reluctance* to testify, which, in context, conveyed the same sense as refusal." PA C-43 (emphasis in original).)

Wager made no efforts to present the insanity defense. He did not advise the parents to talk to others about testifying even though the mental health experts had previously interviewed the parents and were ready to counsel them about their concerns. RT 105-106, 111. Wager did not ask for a brief continuance to permit the parents to reconsider their "reluctance." He never told respondent that his parents had refused to testify, or asked respondent to talk to them about reconsidering. RT 111.

Importantly, Wager knew he could proceed with his

expert evidence at the NGI trial as he correctly assumed that live parental testimony was not important or necessary to their testimony. RT 99. The experts testified at the hearing that they would have presented their testimony with equal vigor whether or not the parents testified because the parents' information was incorporated into their opinions from interviewing them.

Wager's decision to waive the NGI trial was prompted by an erroneous understanding of California law. This was his first insanity defense trial. He incorrectly believed that the jury's finding of first-degree murder was the functional equivalent of a finding that Mirzayance was legally sane, and that the insanity defense was virtually hopeless for that reason. The only ray of hope Wager claimed to see was the possibility of some kind of jury nullification based on sympathy for respondent if his parents testified and wrenched the jurors' hearts: "I saw no sense in proceedings with a defense that had no possibility now of having an emotional portion to it so that the jury could then find in favor of this defendant they had already found guilty of first-degree murder and, whether they knew it or not, under the facts of this case, legally sane. Without the parents, it would be hopeless. That was my feeling at the time." RT 65.

Wager's gross misunderstanding of California law led to his self-inflicted state of hopelessness. He wrongly believed that the jury's guilt finding of first degree murder

was tantamount to a rejection of the insanity defense: "*once the jury had found that he had maturely and meaningfully deliberated and premeditated,* they had unknowingly decided that he had -- he knew the consequences of his actions and the nature and quality of his actions although they didn't know it.[3] But in order to find, therefore, that he was insane, he [the jury] would have to in effect disregard their earlier findings." RT 124-125 (emphasis supplied). His understanding of the relevant law was wrong.

At the guilt trial, the prosecutor correctly argued to the guilt jury that a finding of insanity and a finding of first degree murder were independent of each other: "Rational plays no part in this particular case because the defendant did not act rationally. That does not negate malice, it does not negate premeditation and deliberation." Trial RT 842-843.[4]

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[3] The "maturely and meaningfully" mental elements of first-degree murder were deleted from the California statutory definition of first-degree murder in 1981. All the jury had to find in 1997 for first-degree murder was intent to kill "formed or arrived at or determined upon as a result of careful thought and weighing considerations for and against the proposed course of action," which could occur "in a short period of time." Calif. Penal Code § 189. The second panel opinion noted Wager's error at PA B-5 n. 1.

[4] The prosecutor also reminded jurors that "sanity is conclusively presumed. You are not dealing with that issue here...." Trial RT 768. "So don't sit back there and argue whether or not he was insane or whether he was sane. That is not yet before you...." Trial RT 769. Further,"[a] finding of deliberation and premeditation is

(continued...)

Wager's subjective hopelessness was thus attributable in significant part to his misunderstanding of California law. At the same time, Wager clearly recognized that withdrawal of the insanity defense afforded no benefit to respondent whatsoever, but rather doomed him to a mandatory life term in state prison:

> Q. Was there anything Alex [respondent] gained by waiving the N.G.I. trial?
>
> A. [Wager] No. RT 123.

All the subpoenaed mental health experts were shocked by the abandonment of the insanity defense. As Dr. Bennett Blum testified: "Being informed of the decision to withdraw the insanity plea was a surprise to me given the conclusions reached by myself and other mental health experts regarding Mr. Mirzayance's state of mind. I was not consulted about this decision. In my judgment, based on the data and information available to me, the plea of not guilty by reason of insanity in this case was reasonable and thus my surprise at the announcement of its abrupt withdrawal." RT 553.

Dr. Ronald Markman, a psychiatrist and lawyer, testified he "was not consulted prior to the abrupt withdrawal of the NGI plea which did not make either psychiatric or legal sense. In my judgment, based on the

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[4](...continued)
not negated by evidence a defendant's mental condition was abnormal or his perception of reality delusional." Trial 844.

data and information available to me, the plea of not guilty by reason of insanity was a viable one to present to the jury." RT 589.[5]

Dr. Kaushal Sharma testified that he too was: "very surprised to learn that the defense withdrew the insanity phase of the trial. I was not consulted about the wisdom of this course ahead of time and I would have questioned it. I would have asked why this was being done and what benefit there was in this course of action after a finding of first-degree murder. In my judgment, if presented to the jury, Alexandre [Mirzayance] had documentary evidence, lay witnesses, and qualified, experienced expert witnesses to support defenses to both premeditated murder and to show insanity at the time of the killing. I have seen mental state defenses put on with far less compelling supportive evidence." MER 610 . The parents' input to him about their son's "mental state and history could have come into evidence through my testimony." Id. at 610-611. (In fact, most of the parents' knowledge about petitioner's childhood had already been presented to the jury during guilt phase through Dr. Satz's testimony, *e.g.*, Trial RT 474, 479; 481.)

Dr. Richard Romanoff testified he found in

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[5] Dr. Markman arrived at the courthouse the morning the NGI trial was to begin. When Wager told Dr. Markman he had just waived the NGI trial, Markman immediately responded, "Now, that was a mistake." RT 123. Dr. Markman was highly regarded by Wager as a middle of the road doctor with a good reputation. RT 34.

respondent "substantial evidence of cognitive disorganization and an active thought disorder. In talking to him, I found a lot of his conversation wandered from one topic to another. At times, it was difficult to follow this conversation due to the absence of any logical connection between the thoughts expressed by Mr. Mirzayance. Mr. Mirzayance reported on-going auditory and visual hallucinations and intense fearfulness and paranoia. He mostly exhibited a blank and affectless expression. Testing provided substantial information about the nature and severity of his psychotic thought process. I concluded that it was ... most likely that this disorganization, confusion, and psychotic process is more pervasive and long standing in nature and not simply a reaction to the recent tragic events that had unfolded. I found that he suffered from a severe and debilitating mental illness." MER 632.

Dr. Sandhu, a prosecution expert, opined respondent was not insane, but also that he did not premeditate or deliberate the killing. RT 437. According to his resume, Dr. Sandhu has focused his career on geriatric psychiatry. RT 424. He agreed respondent's bizarre behavior at the Ookhten home the afternoon of the homicide "could be somebody who has some paranoia, yes." RT 454. He found "no motive or rationale for the crime," and knew the relationship between Mirzayance and his cousin had been fairly close. RT 450. He agreed that while in jail following his self-surrender, that doctors at the jail "had to determine

that he was psychotic in order to get an antipsychotic drug," as respondent was prescribed. RT 446-447.

Dr. Seawright Anderson was the other prosecution psychiatrist. He turned out to be supportive of the insanity defense when questioned at the federal hearing. Dr. Anderson agreed with virtually all the observations and analysis of the defense experts noted above. RT 412-413. His diagnosis of respondent was schizoaffective bipolar disorder with a history of marijuana and hashish abuse, accompanied by "psychotic episodes most of his life." RT 412. When asked if respondent "at the time he was harming the victim he knew that harming her was wrong," Dr. Anderson testified: "I felt that he felt that he was justified in doing what he was doing because of the psychotic condition he was under. In breaking it down that way, we would say he felt that he was justified in not doing anything wrong from his interpretation, not from the legal interpretation." RT 418-419. Not understanding wrongfulness at the time of the homicide due to psychosis is legal insanity under the California right/wrong test.

SUMMARY OF ARGUMENT

The Ninth Circuit panel correctly applied the 28 U.S.C. § 2254(d) standard to the facts established at the evidentiary hearing to properly conclude that the state court denial of relief was an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984), and its progeny. The Ninth Circuit panel correctly found that no

valid tactical reason existed for withdrawing the likely meritorious insanity defense.

ARGUMENT

I. The Panel's Unpublished Opinion Was a Straight Forward Application of 28 U.S.C. § 2254 to an Ineffective Assistance of Counsel Claim for Which Respondent Established Both Deficient Performance and Actual Prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

A. Petitioner's Claim that the Panel Relied on a New Rule is Rebutted by the Record. No New Rule Was Announced.

Attempting to create a *certiorari* worthy issue, petitioner asserts the panel found that any time there is "nothing to lose" in advancing a potentially arguable defense, it is ineffective assistance of counsel not to litigate it regardless of the merits or strength of the defense. Petition, p. 11. Not so. The panel held that in the detailed factual context of this case as established at the federal evidentiary hearing:

> Counsel's advice to Mirzayance to withdraw the insanity plea "fell below an objective standard of reasonableness," and therefore constitutes deficient performance. *Strickland,* 466 U.S. at 688. Counsel testified at the evidentiary hearing that he recommended withdrawal of the NGI defense "out of a sense of hopelessness," basing his decision on two factors. Counsel explained that he did not believe a jury that had found

> premeditation would find insanity, and therefore the jury's first-degree murder verdict rendered success in the insanity phase almost certainly unattainable. Further, the "triggering event" that precipitated his decision was the supposed refusal of Mirzayance's parents to testify in the insanity phase. PA B-4.

The panel found that trial counsel's emotional decision made on the drive to the courthouse the morning of trial was based on speculation. The panel decision did not apply a "nothing to lose" rule, nor did the panel even use such language. It noted that its citation to Profitt v. Waldron, 831 F.2d 1245 (5th Cir. 1987) in the first panel decision remanding for a hearing was to emphasize that trial counsel's self-labeling a decision as "tactical" does not necessarily mean the decision was truly tactical, that is, a choice between "alternatives that each have the potential for both benefit and loss." PA B-4.

The panel correctly found the decision made by counsel was unreasonable because on the facts of this case there was no tactical advantage in the decision to give up the only defense available (PA B-6), and that the decision was based on Wager's misguided speculation that the jury's guilt decision on first degree murder doomed the chance for an insanity verdict. Ibid.[6] Further, the decision to withdraw

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[6] Wager testified the jury "whether they knew it or not, under the (continued...)

first developed on a drive to the courthouse the morning of the NGI trial when the respondent's parents expressed reluctance to testify, and that this angered counsel such that he lost his sense of advocacy. Id. at 5. The panel correctly found that the reluctance was hardly cast in stone given that respondent's father, according to trial counsel, thereafter changed his mind and said he would testify and then said that he wouldn't. RT 106. Based on the record of the strength of the defense evidence, the panel further found prejudice in that there was a reasonable probability sufficient to undermine the confidence in the outcome of the case. Id. at 6.

B. Strickland's Two Prong Test Applied.

This decision hardly stands for the "nothing to lose" standard put forth by petitioner. Rather, it is a classic application of this Court's Strickland two prong test: was counsel's performance deficient, and was there prejudice? Wiggins v. Smith, 539 U.S. 510, 521 (2003).

1. Counsel's Deficient Performance. Petitioner can point to no case that finds adequate performance where trial counsel surrenders his client's only and entirely credible defense for no benefit whatsoever. Such a case could not withstand scrutiny under this Court's teaching in Wiggins. In assessing counsel's tactical choice, Wiggins noted that counsel elected there not to present mitigation evidence at

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[6](...continued)
facts of this case, [found respondent] legally sane. RT 65, 125, 145.

sentencing and elected "to pursue an alternate strategy instead." Ibid. That tactical choice was found unreasonable even though there was an alternative that counsel was pursuing. Here, there was no alternative strategy whatsoever. Counsel just gave up the one and only perfectly good defense for no countervailing benefit as opposed to "making an informed choice among possible defenses." Id. at 525.

Indeed, none of the three cases cited at Pet. 12, support petitioner. In Jones v. Barnes, 463 U.S. 745 (1983) the defendant requested several issues be argued by his appellate counsel. Counsel used his own discretion and argued three of the seven issues as the strongest arguments for relief. All of the issues were before the appeal court. This Court upheld that strategic choice where counsel argued the strongest issues. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752.

Arguing all the claims was not required. Jones stands for the non-controversial proposition that counsel's reasoned choice to argue stronger defenses as opposed to marginal ones is effective assistance of counsel. (U.S. v. Cronic, 466 U.S. 648 (1984), cited by petitioner at Pet. 12, is not relevant to these issues.)

Evitts v. Lucey, 469 U.S. 387, 394 (1985), cited Jones v. Barnes, *supra,* and upheld a grant of habeas relief

based on trial counsel's failure to perfect the initiation of defendant's appeal, stating counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim."

In Evans v. Meyer, 742 F.2d 371, 373-374 (7th Cir. 1984), the court held that the defendant had a theoretical defense of intoxication, but faced 120 years if convicted by trial. Counsel's advice to plead guilty and receive a 9 and 1/2 year sentence was reasonable because "no competent counsel would have advised Evans to risk a trial in which his defense would have been intoxication." Id. at 373. Of course, an attorney may advise a client to plead guilty, even when there is a *bona fide* potential defense, so long as the advice falls in the range of competence. In Evans v. Myer, where there was a theoretical defense, counsel was competent in advising a guilty plea and saving the client a potential century of prison time if convicted after trial.

But giving up the *only* defense a defendant has is not reasonable conduct under the Sixth Amendment when there is no risk in advancing it and the defense is viable.

As to prong one of Strickland, the unreasonableness of the decision was clear given the hasty decision made in anger and a sense of "hopelessness." Wager could not assure the federal court that he was functioning as an advocate[7] for respondent when he advised his client to waive

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[7] "Q. Do you think that morning, given your anger at the parents, (continued...)

his only defense (based in part upon his erroneous understanding of the law). Yet, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975), quoted in U.S. v. Cronic, *supra* at 655.

As noted, Wager's hopelessness was in part prompted by his fundamental error in his understanding of the law, an error petitioner evidently adopts. *See* Pet. 13. But as the panel opinion states, defense counsel was wrong. B-5 n.1. The legal issues between murder elements and NGI are different, and it is entirely possible in California to have a first degree conviction *and* an NGI finding. *See* People v. Villarreal, 167 Cal. App. 3d 450, 455, 213 Cal. Rptr. 179 (1985) ("appellant asks us to hold that an insane person, as a matter of law, cannot commit first-degree murder," but "[w]e decline to do so"); People v. Corona, 80 Cal. App. 3d 684, 713, 145 Cal. Rptr. 894 (1978) ("[i]t is, of course, elementary that the legal defense based on insanity embraces a question different from diminished capacity [a guilt phase defense to the element of murder]." Wager's fundamental legal error tainted his unreasonable decision to abandon the NGI defense. The panel was correct to so find.

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[7](...continued)
you became so emotional that you lost your sense of advocacy? ¶ A. I'm not sure. I'm not sure." RT 124.

Also, by giving up the trial, Wager did not know that if he had cross-examined Dr. Anderson at the NGI phase, he could have obtained a highly favorable expert opinion from the State's own expert supporting the "wrongfulness" prong of the California insanity test.

Petitioner urges that the panel created a new "nothing to lose" rule because it relied on the fact that respondent gained nothing from Wager's decision to forfeit his only defense. Pet. 11. Not so. As a matter of common sense in considering prong one reasonableness, a court must consider the basis of counsel's decision and the choices available to him. Here, counsel admitted he chose to surrender the only defense available and that there was no possible upside for respondent. That is not Sixth Amendment advocacy. Consideration of the choices available to counsel is an entirely legitimate and necessary factor in considering reasonableness of counsel's conduct. *See* Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001) ("strategic" decision not to investigate held ineffectiveness); Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999) (a strategic decision is one made "on the basis of sound legal reasoning, to yield some benefit or avoid some harm to the defense"); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (ineffectiveness found where counsel "did not choose, strategically or otherwise, to pursue one line of defense over another," but instead, "simply abdicated his responsibility to advocate his client's cause.")

Abandoning advocacy and surrendering respondent's credible defense was the hallmark of ineffective counsel. As stated long ago in American Bar Association Ethics Opinion 280 (1949), counsel is to proceed with objectively viable claims even if counsel has subjective doubts whether the claim will prevail:

> [T]he lawyer...is not an umpire, but an advocate. He is under no duty to refrain from making any proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or the authorities supporting it is irrelevant.[8]

2. Resulting Prejudice. As to prong two of Strickland, the panel was correct in finding that the failure to go forward with the NGI trial undermined the court's confidence in the outcome. Respondent's strong showing caused the first panel to reverse the district court and to remand the case to determine why counsel waived such a "viable and strong" defense. PA D-75. On remand, the

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[8] *See* Commentary to §1.2, ABA Standards, The Defense Function, 122-123 (3rd Ed.1993), on counsel's duty to present the client's case: "Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment."

district court found, "witnesses could have testified credibly and therefore perhaps successfully--even though subject to potential strong cross-examination -- such that prejudice is established, as the Court's confidence in the verdict therefore is undermined." PA C-68. The second panel affirmed based on respondent's showing of a reasonable probability that but for counsel's error the outcome would have been different. PA B-6. That is a virtual textbook application of the second Strickland prong.

The record amply supports these findings. There was an unusual and strong consensus among the various mental state experts supporting an NGI finding. Indeed, one of the prosecution's experts, Dr. Anderson, endorsed the key opinion that respondent did not know the wrongfulness of his acts at the time of the homicide. That left one prosecution witness, Dr. Sandhu, a specialist in geriatric medicine, with a lone dissenting opinion.[9] Moreover, the consensus of the several experts was supported by the corroborating evidence of respondent's childhood psychological problems, treatment by child psychologists, the parents' history concerning respondent's childhood psychological problems as presented during the guilt phase

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[9] Dr. Anderson endorsed the defense experts opinions on respondent's paranoid schizophrenia at the time of the homicide. He also testified that because of respondent's psychosis at the time of the homicide, he believed himself justified in his conduct, an expert opinion supporting respondent's legal insanity, that is, a lack of understanding wrongfulness due to a mental disease.

through Dr. Satz, the lay witness testimony of Laurent Meira and the Ookhtens relatives about respondent's paranoid behavior the week of the homicide. All this expert and lay witness evidence before the jury presented the likelihood of a different result sufficient to undermine confidence in the outcome actually reached. Rompilla v. Beard, 545 U.S. 375, 379 (2005).

Petitioner argues that Wager recognized his experts had "significant weaknesses." Pet. 15. But Wager knew of these purported weaknesses well before the NGI trial, a trial that he was prepared to go forward with on the day he abandoned it. Given this, Wager's "weakness" rationale is a comment that "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description" of his thinking (Wiggins, *supra* at 526-527), and "a mistaken memory shaped by the passage of time." Id. at 533.[10]

The mere fact that there was conflicting testimony does not in any way negate the panel's finding of prejudice. Here, the overall weight of the testimony clearly supported an NGI finding, and was at least sufficiently strong to undermine judicial confidence in the outcome.

Wager's concern that the defense needed the parent's contribution about respondent's childhood was met in part by Dr. Satz's testimony at the guilt phase. As given the

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[10] There was no expert who would have been called to be impeached with a note alteration in another case, as petitioner states at Pet. 15, because Wager said he wouldn't have called him. RT 56.

jury, Dr. Satz recounted the parents' history of respondent including that he had subnormal intelligence, an extremely low self concept, and early experiences with auditory hallucinations. At age 5 or 6, they sought professional help for him. His condition became more florid so that by age 14 he was taken to see two psychiatrists. Trial RT 475-476.

As the experienced forensic psychiatrists testified (Dr. Markman, Dr. Blum, Dr. Sharma, and Dr. Romanoff), and as supported by the State's Dr. Anderson, the insanity defense was quite viable, supported by respondent's childhood history of mental problems, his paranoid conduct the week of the homicide, and psychotic break from reality at the time of the homicide. Prejudice was established.

C. The Panel Correctly Applied AEDPA's Standard of Review.

Despite the petitioner's protests to the contrary,[11] the panel recognized and applied the habeas review standard under AEDPA, 28 U.S.C. 2254(d)(1). As the panel opinion stated:

> We are required by the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214 (1996)("AEDPA") to give significant deference to the decision of the state court. Where, as here, the state court has provided an adjudication on the merits of the habeas claim but has not explained its

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[11] As this case is to be assessed on its own merits, respondent will not reply to the pejorative references to the Ninth Circuit. Pet. 7-8.

> underlying reasoning or held an evidentiary hearing, however, we conduct an independent review of the record to determine whether the state court's final resolution of the case was an unreasonable application of clearly established federal law. See Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003)("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable."); Greene v. Lambert, 288 F.3d 1081, 1088-89 (9th Cir. 2002) (explaining AEDPA standard of review where state court provides no reasoned explanation for its decision on petitioner's claim). We therefore independently review the state court record and the evidentiary hearing held by the district court upon remand, and conclude that the state court's denial of habeas relief to Mirzayance was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). PA B-3.

Again, this is a textbook summary of the 2254 standard.

Next, petitioner incorrectly asserts that factual findings made by the district court were not given due deference on appeal. Pet. 8-9, 14-16. For example, petitioner states the panel incorrectly rejected the district court's finding that the parents *refused* to testify, and recharacterized their conduct as mere "reluctance" to testify.

Pet. 14. However, the R&R itself states that the "parents may not have expressly refused to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." PA C-43. The panel decision faithfully follows the lower court's factual finding that the parents' expressed reluctance to testify. But the R&R's *conclusion* that reluctance meant refusal is not a factual finding. It does not merit deference.

The panel did disagree with the R&R that Wager's decision to withdraw the defense was "rational, carefully considered, and informed." Pet. 14. That is not fact finding. That was a conclusion based on the fact that Wager made his decision, as he admitted on the stand, in anger, with a loss of advocacy for his client, on the very morning he was to commence the NGI trial and with Dr. Markman subpoenaed and waiting to testify that morning. The parent's testimony was hardly a "key" to the NGI defense given that the substance of their contribution had already come into evidence from Dr. Satz during the guilt phase, and anything additional from the parents could have come in via the NGI doctors' testimony (all of whom interviewed the parents).

Wager made a grossly unreasonable decision the morning of the trial to abandon his client's only defense. He had prepared the NGI defense, told the jury they would get the NGI trial after the guilt phase (Trial RT 117, 220, 229, 244, 258, 361, 388, 441, 487, 493-496, 553, 589, 591, 620, 688, 689-691), and had expert witnesses ready to testify the

morning he had his client waive the defense.

The key factual point on which there is no dispute is that Wager's surrender of the NGI defense had no actual or potential benefit for respondent. The legal question decided by the panel based on these undisputed facts was that Wager abandoned his client's viable defense for no rational or strategic reason, but instead for reasons of his own subjective hopelessness, anger, speculation, erroneous understanding of the law, and an abandonment of his role as an advocate. The conclusion that he acted unreasonably under the Sixth Amendment (and that the State court's unwritten "decision" was contrary to, or an unreasonable interpretation, of Strickland) is entirely correct.

CONCLUSION

It is respectfully requested that the petitioner's petition for certiorari be denied.

October 16 , 2006 Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL A. KNOWLES, Warden, California Department of Corrections and Rehabilitation, *Petitioner*,

v.

ALEXANDRE MIRZAYANCE, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

1. Mirzayance devotes only the last few pages of his opposition brief to the Questions Presented. On the question of the Ninth Circuit's failure to properly apply 28 U.S.C. § 2254(d), Mirzayance simply asserts that the panel made a "textbook" prefatory statement of the § 2254(d) standard. Opp. 23. But he fails to come to grips with the facts revealing that the panel did not adhere to the standard. First, rather than review whether the state court decisions had been reasonable, the panel stated that it would analyze Mirzayance's claim in light of "the evidentiary hearing held by the district court upon remand." Second, in actually carrying out that analysis, the panel merely decided the question of error, concluding that counsel's performance was inadequate and that Mirzayance suffered prejudice under *Strickland* v. *Washington*. Its analysis never even adverted to the separate question that serves as the dispositive one under AEDPA: whether, wrong or not, the state court decision was nevertheless reasonable. See *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 75 (2003).

As explained in the State's petition, it would not have been "objectively unreasonable" under "clearly established Federal law" for the state courts to decline to apply a per se "sole defense/nothing to lose" corollary to the *Strickland* competent-performance rule that Mirzayance—his denials notwithstanding—presses here. Cf. *United States* v. *Cronic*, 466 U.S. 648, 656-57 n.19 (1984) ("If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."). And it is not "objectively unreasonable" to conclude that, in any event, withdrawal of the not-guilty-by-reason-of-insanity plea gave rise to no sufficient "probability" of prejudice under the second prong of the *Strickland* standard. Reasonable support for such a conclusion lies in the fact that Mirzayance bore the burden of proof on the insanity issue and that the same jury already had found that Mirzayance had killed with premeditation and deliberation. Perhaps most important, strong evidence of Mirzayance's consciousness of guilt at the time of

the murder hopelessly undercut any probability that the jury would nevertheless find that he was "insane" in that he could not tell the difference between right and wrong. See Pet. for Cert. 13-14.

2. Even if Section 2254(d) as amended by AEDPA did not compel denial of habeas corpus relief on the basis of the objective reasonableness of the state-court decisions alone, Mirzayance is incorrect in proffering his one-sided version of the "facts" for those properly found by the district court and improperly ignored by the Ninth Circuit panel. As explained in the certiorari petition, the district court after an evidentiary hearing resolved the essential factual disputes against Mirzayance. Pet. for Cert. 4, 15. Among other findings, the district court concluded: that trial counsel's "decision was carefully considered, not rashly made," after concurrence by co-counsel; and that Mirzayance's "parents may not have *expressly refused* to testify, but they expressed a pronounced reluctance to do so, which amounted to the same thing." See Pet. App. 43-47. As explained in the certiorari petition, Pet. for Cert. 14-16, the district court's factual- findings would have compelled the denial of relief, but the Ninth Circuit improperly ignored them in derogation of the "clear error" standard of review.

Mirzayance's "Statement of Facts" is little more than an argument about the credibility of witnesses and the persuasiveness and weight of the evidence. Thus, Mirzayance asserts that his lawyer did not know the legal difference between the mental state for first-degree murder and the mental state for insanity. See Opp. 6-7. But he makes that assertion without the benefit of any finding by either the district court or the Ninth Circuit—and without justification in the record. In addition, Mirzayance argues that the district court's conclusion—that the parents' pronounced reluctance to testify in context conveyed an outright "refusal" to testify and that counsel believed it to be a "'done deal' that any beseeching on his part could not undo," see Pet. App. 43-47—somehow is not a finding of fact.

However incorrect he is in asserting that this was not a factual finding, it is nevertheless noteworthy that Mirzayance does not dispute that the record provided the district court with reasonable support for its conclusion. If a finding of fact at all—and it clearly is—it was binding on the appellate panel.

3. Perhaps seeking to avoid application of AEDPA's deferential-review standard, Mirzayance also asserts that the state courts failed to adjudicate the merits of his ineffective-counsel claim. Opp. 1. But he is wrong: both the California Court of Appeal and the California Supreme Court summarily resolved Mirzayance's ineffective-assistance claim, Pet. App. F & H; and, under California procedure, such rejections are adjudications on the merits. *People* v. *Duvall*, 886 P.2d 1252, 1258-59 (Cal. 1995); *In re Clark*, 855 P.2d 729, 741 n.9 (Cal. 1993); *In re Lawler*, 588 P.2d 1257, 1259 (Cal. 1979); see *Harris* v. *Superior Court,* 500 F.2d 1124, 1126 (9th Cir. 1974). Mirzayance himself acknowledges, elsewhere in his opposition brief, that the panel was correct to apply AEDPA's standard of review. Opp. 22. Indeed, in the district court and in the first Ninth Circuit appeal, Mirzayance repeatedly acknowledged that the AEDPA standard governed his claim. He cannot change his position now. See *Zedner* v. *United States*, 126 S. Ct. 1976, 1987 (2006).

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: October 30, 2006

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